

**A Government of the Lao People's Democratic Republic v
 Thai-Lao Lignite Co Ltd ('TLL'), a Thai Co & Anor**

**B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS
 NO 24NCC(ARB)-7 OF 2010
 LEE SWEE SENG JC
 1 MARCH 2013**

**C *Arbitration — Award — Setting aside — Breach of rules of natural justice —*
 Arbitration tribunal exceeding jurisdiction and exercising jurisdiction wrongfully
 — Wrongful exercise of jurisdiction over non-parties to arbitration agreement —
 Wrong choice of law applied — Exercise of jurisdiction over contract which was not
**D *subject to arbitration clause — Arbitration tribunal going beyond scope of*
 submission to arbitration — Award conflicting with public policy of Malaysia —
 Whether arbitration tribunal had breached rules of natural justice — Whether
 estoppel, acquiescence and waiver applied to prevent plaintiff from disputing
**E *jurisdiction of arbitration tribunal — Whether court could excise invalid portion of*
 *award — Arbitration Act 2005 s 37(1)(b)(ii)*******

**F *Arbitration — Parties — Privity — Only party to arbitration agreement to*
 participate in arbitration proceedings — Whether doctrine of 'intended beneficiary'
 *recognised in Malaysia***

**G The plaintiff was the Government of Laos ('Laos'). The first defendant ('TLL')
 was Thai company and the second defendant ('HLL') was a Laos company.
 Laos and TLL had entered into two mining contracts ('the mining contracts')
 for the mining of lignite in a concession area in Laos. Subsequently Laos and
**H TLL entered into a Project Development Agreement ('PDA'). TLL and HLL
 were formed by a Thai businessman named Mr Siva. TLL incorporated HLL to
 perform the lignite mining work. The mining contract had a dispute resolution
 clause which provided that disputes had to be referred to the Laotian Board of
 Economic Conciliation or Laotian Court or International Economic Dispute
**I Settlement Organisation. The mining contracts also provided that the
 agreement would be governed by the law of Laos. The PDA was the fruition of
 further discussions between Mr Siva and Laos. Under the PDA, Laos granted
 TLL a concession to build a power plant at Hongsa to produce electricity. The
 plan was to sell the electricity to a Thai state-owned electricity board. HLL was
 not a signatory to the PDA. The PDA provided that any disputes arising under
 the PDA had to be referred to arbitration to be conducted in Malaysia.
 Subsequently Mr Siva set up a separate Lao company, Thai-Lao Power Co Ltd
 ('TLP') for the purpose of obtaining a Lao license to build and operate the
 power plant in Laos. Another company called South East Asian Power Co******

(‘SEAP’) was incorporated for the purpose of arranging bank financing for TLP. SEAP and TLP never acquired any rights and obligations under the mining contracts as well as under the PDA to which Laos was a party. Due to the economic meltdown, both projects did not take off. Hence, after about 10 years, the plaintiff terminated the PDA and the mining contracts. The defendants activated the arbitration clause in the PDA and claimed damages close to USD200m for wrongful termination of the PDA. The defendants filed their claim with an arbitral tribunal consisting of three arbitrators from the United States (‘the Tribunal’). The plaintiff here was the respondent in the arbitration and the defendants here were the claimants. The tribunal handed down an award of about USD56m in favour of the defendants. The plaintiff thus filed this originating summons to set aside the award mainly on two grounds. Firstly, on the grounds that the tribunal had exceeded its jurisdiction and had exercised its jurisdiction wrongfully. The tribunal had ordered the investment costs to be paid to non-parties to the PDA by taking into consideration the evidence of investment costs incurred by HLL, TLP and SEAP under the mining contracts and in that sense wrongfully exercising its jurisdiction over non-parties to the arbitration agreement. Secondly, on the grounds of public policy in that the tribunal breached the rules of natural justice in granting a ‘premium’ of 10% of investment costs to TLL and HLL when both parties had submitted differently on it.

Held, allowing the application with costs:

- (1) A breach of the rules of natural justice which constitutes a ground of setting aside an award is expressed as one where the award is in conflict with the public policy of Malaysia (s 37(1)(b)(ii) of the Arbitration Act 2005 (‘Act’)). It is not every breach of the rules of natural justice that would offend the public policy principle (see para 29).
- (2) Viewed objectively, the plaintiff had not gone beyond the point of no-return where estoppel, acquiescence and waiver was concerned, bearing in mind that it had raised its objection to the tribunal exercising jurisdiction over the mining contracts which were governed by the law of Laos, over non-parties to the arbitration agreement in HLL and in awarding investment costs to non-parties of the PDA in its defence as well as opening and closing memorials (see para 74).
- (3) The mining contracts and the PDA were separate contracts with substantially significant differences between them. The applicable law under the mining contracts was Laos law whereas the proper law of the PDA was a mixture of Laotian law and New York. The dispute settlement mechanism was also different. It was unthinkable that Laos had agreed through article 14.1 of the PDA to arbitrate HLL’s claims under the mining contracts. Only Laotian law applied to the mining contracts. It

- A would be a breach of the spirit as well as the manifest understanding of the parties for claims under the mining contracts to be decided by New York law (see paras 77–9).
- B (4) By assuming jurisdiction over disputes arising out of the mining agreement in an arbitration under the PDA, the tribunal had gone beyond the scope of the submission to arbitration. The consequence was that there was nothing left to be arbitrated and adjudicated at all under the mining agreement as the claimants/defendants under the PDA arbitration had obtained the whole of their reliefs (see para 84).
- C (5) The Act also does not permit anyone, other than a party to the arbitration agreement, to participate in the arbitration proceedings. The doctrine of 'intended beneficiary' is not a recognised exception to the privity rule under the laws of Malaysia (see paras 102–103).
- D (6) Jurisdictionally speaking, so-called 'lost investment' costs were not recoverable under the mining contracts. Their inclusion by the aggregation method as a PDA claim by the arbitrators was a fundamental jurisdictional error. The jurisdictional complaint was both a party and contracts complaint in that the arbitrators failed to separate the investment costs by contracts or by party. In failing to do so the award ended up dealing with a dispute not contemplated by or not falling within the terms of the submission to arbitration as envisaged by s 37(1)(a)(iv). By the same reason the award contained decisions on matters beyond the scope of the submission to arbitration as envisaged by s 37(1)(a)(v) (see paras 123–124).
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- F (7) The court could not excise the portion of the award which was attributable to claims under the mining contracts and the portion under the PDA. It had been so co-mingled and computed together such that it was impossible to excise and extract that which should strictly stem from the PDA as opposed to that which had its source traceable to the mining contracts. Hence, the whole award had to be set aside. The dispute confining to the PDA and solely between the parties to the arbitration agreement was to be re-arbitrated before a new panel (see paras 126–127).
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[Bahasa Malaysia summary]

- I Plaintiff merupakan Kerajaan Laos ('Laos'). Defendan pertama ('TLL') merupakan sebuah syarikat Thai dan defendan kedua ('HLL') merupakan sebuah syarikat Laos. Laos dan TLL telah memeterai dua kontrak perlombongan ('kontrak-kontrak perlombongan') untuk melombong lignit dalam satu kawasan konsesi di Laos. Kemudiannya Laos dan TLL memeterai satu Perjanjian Pembangunan Projek ('PPP'). TLL dan HLL ditubuhkan oleh seorang ahli perniagaan Thai bernama Encik Siva. TLL telah memperbadankan HLL untuk menjalankan kerja melombong lignit. Kontrak

perlombongan tersebut mempunyai satu klausa penyelesaian pertikaian yang memperuntukkan bahawa pertikaian harus dirujuk kepada Lembaga Pendamaian Ekonomi Laos atau Mahkamah Laos atau Organisasi Penyelesaian Pertikaian Ekonomi Antarabangsa. Kontrak-kontrak perlombongan juga memperuntukkan bahawa perjanjian tersebut ditadbir oleh undang-undang Laos. PPP merupakan hasil daripada perbincangan antara Encik Siva dan Laos. Di bawah PPP, Laos memberikan TL satu konsesi untuk membina sebuah loji kuasa di Hongsa untuk menghasilkan elektrik. Perancangan adalah untuk menjual elektrik kepada lembaga elektrik milik Negara Thai. HLL bukan penandatanganan kepada PPP. PPP memperuntukkan bahawa apa-apa pertikaian yang timbul di bawah PPP perlu dirujuk kepada timbang tara dan dijalankan di Malaysia. Selepas itu, Encik Siva menubuhkan sebuah syarikat Laos yang lain, Thai-Lao Power Co Ltd ('TLP') bagi tujuan mendapatkan lesen Laos untuk membina dan mengendalikan loji kuasa di Laos. Syarikat lain yang dipanggil South East Asian Power Co ('SEAP') telah ditubuhkan bagi tujuan mengatur pembiayaan bank untuk TLP. SEAP dan TLP tidak memperoleh sebarang hak atau kewajipan di bawah kontrak-kontrak perlombongan begitu juga di bawah PPP yang mana Laos merupakan pihak yang terlibat. Disebabkan kemerosotan ekonomi, kedua-dua projek tersebut terbengkalai. Oleh itu, selepas lebih kurang sepuluh tahun, plaintif menamatkan PPP dan kontrak-kontrak perlombongan. Defendan-defendan mengaktifkan klausa timbang tara dalam PPP dan menuntut ganti rugi hampir kepada USD200 juta untuk penamatan salah PPP. Defendan-defendan memfailkan tuntutan mereka dengan sebuah tribunal timbang tara yang terdiri daripada tiga orang penimbang tara daripada Amerika Syarikat ('Tribunal'). Plaintif di sini merupakan responden di dalam timbang tara dan defendan-defendan di sini merupakan penuntut-penuntut. Tribunal memberikan award sekitar USD56 juta bagi pihak defendan-defendan. Oleh itu plaintif memfailkan saman semula ini untuk mengetepikan award terutamanya atas dua alasan. Pertamanya, atas alasan bahawa tribunal telah melebihi bidang kuasanya dan terkhilaf menjalankan bidang kuasanya. Tribunal telah mengarahkan kos pelaburan dibayar kepada bukan pihak kepada PPP dengan mempertimbangkan keterangan kos pelaburan yang ditanggung oleh HLL, TLP dan SEAP di bawah kontrak-kontrak perlombongan dan dalam erti kata tersebut, terkhilaf dalam melaksanakan bidang kuasanya terhadap bukan pihak kepada perjanjian timbang tara. Keduanya, atas alasan polisi awam bahawa tribunal telah melanggar prinsip keadilan asasi dalam memberikan 'premium' 10% kos pelaburan kepada TLL dan HLL apabila kedua-dua pihak telah menghuja secara berbeza mengenainya.

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Diputuskan, membenarkan permohonan dengan kos:

- (1) Pelanggaran keadilan asasi yang merupakan satu alasan mengetepikan award dinyatakan secara tersurat apabila award tersebut bercanggahan

- A dengan polisi awam Malaysia (s 37(1)(b)(ii) Akta Timbang Tara 2005 ('Akta')). Tidak semua pelanggaran keadilan asasi menyinggung prinsip polisi awam (lihat perenggan 29).
- B (2) Dilihat secara objektif, plaintif tidak melangkaui titik tidak berpenghujung apabila berkenaan dengan estoppel, persetujuan dan pengecualian, dengan mengingati bahawa plaintif telah mengemukakan bantahannya kepada tribunal yang melaksanakan bidang kuasa terhadap kontrak-kontrak perlombongan yang ditadbir oleh undang-undang Laos, terhadap bukan pihak kepada perjanjian timbang tara dalam HLL dan dalam mengawardkan kos pelaburan kepada bukan pihak dalam pembelaannya begitu juga dengan pembukaan dan penutupan memorial (lihat perenggan 74).
- C
- D (3) Kontrak-kontrak perlombongan dan PPP merupakan kontrak-kontrak berasingan yang secara asasnya mempunyai perbezaan besar antara mereka. Undang-undang terpakai di bawah kontrak perlombongan ialah undang-undang Laos yang mana undang-undang yang bersesuaian untuk PPP merupakan campuran undang-undang Laos dan New York. Mekanisma penyelesaian pertikaian juga berbeza. Tidak dapat difikirkan bahawa Laos bersetuju menerusi artikel 14.1 PPP untuk menimbang tara tuntutan-tuntutan PPP di bawah kontrak-kontrak perlombongan. Hanya undang-undang Laos terpakai kepada kontrak-kontrak perlombongan. Adalah melanggar semangat begitu juga dengan manifesto persefahaman pihak-pihak bagi tuntutan-tuntutan di bawah kontrak perlombongan untuk diputuskan oleh undang-undang New York (lihat perenggan 77–79).
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- G (4) Dengan mengandaikan bidang kuasa terhadap pertikaian-pertikaian timbul daripada perjanjian perlombongan di dalam timbang tara di bawah PPP, tribunal telah melebihi skop hujahan kepada timbang tara. Akibatnya, tiada apa yang tinggal untuk ditimbang tara dan diputuskan sama sekali di bawah perjanjian perlombongan memandangkan penuntut-penuntut/defendan-defendan di bawah timbang tara PPP telah mendapatkan kesemua relief mereka (lihat perenggan 84).
- H (5) Akta juga tidak membenarkan sesiapa, selain pihak kepada perjanjian timbang tara untuk melibatkan diri dalam prosiding timbang tara. Doktrin 'benefisiari yang sepatutnya' tidak dikenali sebagai pengecualian kepada prinsip priviti di bawah undang-undang Malaysia (lihat perenggan 102–103).
- I (6) Bercakap mengenai bidang kuasa, 'pelaburan hilang' yang dikatakan tidak boleh diperolehi semula di bawah kontrak-kontrak perlombongan. Kemasukan mereka melalui kaedah agregat sebagai satu tuntutan PPP merupakan satu kesilapan bidang kuasa yang utama. Bidang kuasa aduan ialah kedua-dua pihak dan kontrak mengadu bahawa penimbang tara

gagal untuk mengasingkan kos pelaburan melalui kontrak-kontrak atau pihak. Kegagalan berbuat demikian mengakibatkan award tersebut berkait dengan pertikaian yang tidak dijangkakan atau tidak termasuk dalam syarat-syarat hujahan kepada penimbang tara seperti yang dibayangkan oleh s 37(1)(a)(iv). Dengan alasan yang sama, award mengandungi keputusan-keputusan mengenai perkara-perkara melebihi skop hujahan kepada timbang tara seperti yang dibayangkan oleh s 37(1)(a)(v) (lihat perenggan 123–124).

- (7) Mahkamah tidak boleh membuang sebahagian award dan mengagihkannya kepada tuntutan-tuntutan di bawah kontrak perlombongan dan sebahagian di bawah PPP. Ia telah bercampur dan dikira bersama sehinggakan adalah mustahil untuk membuang dan mengekstrak apa yang seharusnya berpunca daripada PPP berlawanan dengan sumber-sumber yang berkaitan dengan kontrak-kontrak perlombongan. Oleh itu, keseluruhan award perlu ditolak. Pertikaian tersebut merangkumi PPP dan hanya di antara pihak-pihak kepada perjanjian timbang tara perlu ditimbangtara semula di hadapan panel baru (lihat perenggan 126–127).]

Notes

For cases on setting aside, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1749–1820.

Cases referred to

Abdul Ghafur bin Mohd Ibrahim v Pengarah, Hospital Kepala Batas & Anor [2010] 6 MLJ 181, HC (refd)

Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others [2013] 1 SLR 636, HC (refd)

Bauer (M) Sdn Bhd v Daewoo Corp [1999] 4 MLJ 545, CA (refd)

Bharat Coking Coal Ltd v M/s Annapurna Construction AIR 2003 SC 3660, SC (refd)

Black Clawson v Papierwerke [1981] 2 Lloyd's Rep 446 (refd)

C v D [2007] 2 Lloyd's Rep 367 (refd)

CRW Joint Operation v PT Perusahaan Gas Negara [2011] 4 SLR 305, CA (refd)

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334, HL (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352, HC (refd)

City of London v Sancheti [2009] 1 LLR 117, CA (refd)

Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan [2011] 1 AC 763, SC (refd)

Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd [2010] SGHC 80, HC (refd)

- A** *Government of India, The v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441, FC (refd)
Government of the Lao People's Democratic Republic v Thai-Lao Lignite Co Ltd ('TLL'), A Thai Co & Anor [2011] MLJU 361 [2011] 5 AMR 753, HC (refd)
- B** *Grupo Torras SA and Torras Hostench London Ltd v Sheikh Fahad Mohammed Al-Sabah & Ors* [1995] 1 Lloyd's Rep 374 (refd)
Hoecheong Products Co Ltd v Cargill Hong Kong Ltd [1995] 1 WLR 404, PC (refd)
Hotel Continental Sdn Bhd v Cheong Fatt Tze Mansion Sdn Bhd [2002] 3 MLJ 529, CA (refd)
- C** *Infineon Technology (M) Sdn Bhd v Orisoft Technology Sdn Bhd (previously known as Orisoft Technology Bhd) and another application* [2011] 7 MLJ 539, HC (refd)
Jiang Haiying v Tan Lim Hui and another suit [2009] 3 SLR(R) 13, HC (refd)
- D** *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597, CA (refd)
Peterson Farms Inc v C&M Farming Ltd [2004] 1 Lloyd's Rep 603 (refd)
Republic of Iraq v BNP Paribas USA 2nd Cir 2012 (refd)
Son Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR 86, CA (refd)
- E** *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1, HC (refd)
Termorio SA v Electranta SA 487 F 3d 928 (refd)
Thomson CSF v American Arbitration Association (1995) 64 F 3d 773, CA (refd)
- F** *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500, QB (refd)
Yusuf Ahmed v Toys 'R' Us 126 F 3d 15, CA (refd)

Legislation referred to

- G** Arbitration Act 2005 ss 2, 7, 7(a), 18, 18(2), (3), (4), (5), (6), (7), (8), (9), (10), 37, 37(1)(a)(iv), (v), (1)(b)(ii), (2)(b), 38(4), 39(1)(a)(vii)
Rules of the High court 1980 O 14A
Cyrus Das (Lam Ko Luen and David Mathew with him) (Shook Lin & Bok) for the plaintiff.
- H** *Cecil Abraham (Sunil Abraham and Idza Hajar with him) (Zul Rafique & Partners) for the defendants.*

Lee Swee Seng JC:

I

[1] This is an application by the plaintiff to set aside an arbitral award handed down under the UNCITRAL Rules. It is an award of no small proportion — collectively to the tune of about USD56m in favour of the defendants who were the claimants at the arbitration. In fact at the time of the

enforcement order in the High Court of England on 19 November 2012 the sum with interest had ballooned to about USD71.5m.

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[2] The application has a chequered if not cumbersome history as it climbed its way through the judicial process to the apex court only to come back where it has first begun at the High Court. A brief chronology would be helpful to put in perspective some of the problems encountered in the aftermath of an award in an international arbitration where parties are foreigners from Laos and Thailand and the seat of arbitration is in Malaysia and the law of the contract is Laos law and the law of New York.

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[3] An Arbitral Tribunal consisting of three arbitrators from eminent international law firms in the United States handed down the arbitral award on 4 November 2009. On 19 October 2011 the plaintiff filed an ex parte leave application to serve an originating summons ('OS') out of jurisdiction in Thailand. The OS is the OS herein to set aside the award. The plaintiff obtained leave to serve the OS on 2 November 2010. The defendants duly obtained leave of court to file a conditional appearance to file their application to set aside the service of the OS out of jurisdiction. The conditional appearance having being filed on 29 November 2010, the defendants on 23 December 2010 filed their said application.

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[4] The application to set aside the service of the OS out of jurisdiction was initially fixed for hearing on 11 March 2011. The learned High Court judge felt that the matter can be expeditiously and efficiently dealt with by moving an application under O 14A of the then Rules of the High Court 1980 ('RHC') (now Rules of Court 2012) to determine the issue of delay on the part of the plaintiff in filing the substantive application to set aside the award. The plaintiff's delay in filing the OS to set aside the award was some nine months.

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[5] In all fairness to the defendants and as highlighted by them, they did not take part in the O 14A application, having taken the position that they were taking a jurisdictional point in their very application to set aside the service of the OS out of jurisdiction. The learned judge of the High Court dismissed the plaintiff's OS to set aside the award on ground of unexplained delay of nine months. Having decided that, the defendants' application became academic and the learned judge struck out the said application with costs to the defendants. See *Government of the Lao People's Democratic Republic v Thai-Lao Lignite Co Ltd ('TLL'), A Thai Co & Anor* [2011] MLJU 361; [2011] 5 AMR 753.

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[6] The plaintiff duly appealed to the Court of Appeal. The Court of Appeal on 26 July 2011 allowed the appeal with no order as to costs and granted the plaintiff an extension of time to file the OS. The defendants filed an application

A to vary the order of the Court of Appeal but that was dismissed on 6 October 2011. The defendants' application for leave to appeal to the Federal Court was dismissed on 26 July 2011.

B [7] The Court of Appeal in granting the extension of time to the plaintiff to file this OS also directed the High Court to hear the issue of the validity of the service of the OS out of jurisdiction in encl 10. It fell upon me to hear the said application of the defendants and on 12 December 2012 after hearing the parties, I dismissed the defendants' application to set aside the service of the OS out of jurisdiction.

C [8] Having done that, I next proceeded on 17 and 20 December 2012 to hear the substantive application to set aside the award in encl 1 of the OS.

D PARTIES, PERSONALITIES AND PRELIMINARIES

E [9] The plaintiff here is the Government of Laos ('Laos'). The first defendant is Thai-Lao Lignite Co Ltd ('TLL'), a Thai company and the second defendant is Hongsa Lignite Co Ltd ('HLL'), a Lao company. Laos and TLL had entered into a mining contract dated 29 May 1992 ('first mining contract') and subsequently on 21 July 1992, they entered into another mining contract ('second mining contract'). Subsequently Laos and TLL entered into a project development agreement ('PDA') dated 22 July 1994. The first and second mining contracts are collectively referred to as the 'mining contracts' and in the award as the 'prior contracts'. The plaintiff here was the respondent in the arbitration and the defendants here the claimants in the arbitration.

F [10] The defendants are companies formed by a Thai businessman named Mr Siva Nganthavee ('Mr Siva'). TLL was formed in 1990 by Mr Siva together with his family members or the companies he controlled.

G [11] The two mining contracts involved the proposed mining of lignite in a concession area in the Hongsa region in the North-West of Laos along the Thai border. The first mining contract was amended by the second mining contract to extend the concession area from 20 square meters to 60 square meters. TLL incorporated a Lao company in HLL to perform the lignite mining work in Laos. HLL was 75% owned by TLL and 25% owned by an agency of the Lao Government.

H [12] In hoping for the best and yet being prepared for the worst, Laos and TLL in the first mining contract have agreed on a dispute resolution clause that reads:

Article 31. Dispute Settlement:

Should there be any dispute, both parties shall discuss and agree to settle it well. Should it not be basically solved, the dispute shall be referred to the Laotian Board of Economic Conciliation or Laotian Court or International Economic Dispute Settlement Organisation.

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[13] The mining contracts also contain a choice of law clause in article 2 which states that the agreement would be governed by the law of Laos.

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[14] As for the PDA, it was the fruition of further discussions between Mr Siva and Laos. Under the PDA, Laos granted TLL a concession to build a power plant at Hongsa to produce electricity. The plan was to sell the electricity to the Thai State-owned Electricity Board known by the acronym EGAT. The second defendant is not a signatory to the PDA.

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[15] The PDA has its own arbitration clause in article 14.1. It reads:

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Article 14.1: arbitration.

- (i) In the event a dispute arises out of this Agreement including any matters relating to interpretation of this agreement ... either party may submit the dispute to arbitration conducted in Malaysia at the Kuala Lumpur Regional Center for arbitration in accordance with the UNCITRAL Rules [...]

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[16] Subsequently Mr Siva set up a separate Lao company, Thai-Lao Power Co Ltd ('TLP') for the purpose of obtaining a Lao license to build and operate the power plant in Laos.

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[17] For a project of this magnitude, capital was of course critical and crucial. As part of Mr Siva's corporate structuring to undertake the project under the mining contracts (the mining project) and the PDA (the power plant project), another company was incorporated for the purpose of arranging bank financing for TLP. It was called South East Asian Power Co ('SEAP'). In the result the subsidiaries and associated companies in Mr Siva's stable appear as follows:

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- (a) TLL which was wholly owned by Mr Siva and his associated companies and family members;
- (b) HLL which was owned 75% by TLL and 25% by an agency of Laos;
- (c) SEAP which was owned 60% by Mr Siva and his associated companies and family members and 40% owned by TLL; and
- (d) TLP which was owned 60% by SEAP and 40% by TLL.

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[18] The plaintiff highlighted the point that SEAP and TLP never did

- A acquire rights and obligations under the mining contracts as well as under the PDA to which Laos was a party.

PROBLEM

- B [19] For ten years, TLL was unable to move the power plant project forward and then the Asian financial crisis set in. What was often described as an East Asian economic miracle had become a meltdown; a boom became a bust. The plaintiff painted a pathetic picture of the problem that after a decade: not a watt of electricity was produced and not an ounce in weight of lignite was mined!
- C The plaintiff sent a letter dated 5 October 2006 terminating the PDA. By another letter dated 11 October 2006, the plaintiff terminated the mining contracts.

- D [20] The best did not happen but the worst did. The parties called into play and the defendants activated the arbitration clause in the PDA and claimed essentially for damages for wrongful termination of the PDA. TLL and HLL claimed close to USD200m in damages arising from the wrongful termination
- E and it included an allowance for financing costs.

- [21] On 26 June 2008, TLL and HLL filed with the tribunal a statement of claim and a petition for interim relief. Thereafter the arbitration process proceeded inexorably with the various timelines being met with the plaintiff
- F filing its initial pleading entitled 'statement of defence, opposition to the petition for interim relief and counterclaims' ('statement of defence') on 29 August 2008; the plaintiff filing its opening memorial on 20 February 2009; the plaintiff filing its reply memorial on 15 June 2009; the plaintiff filing its closing memorial on 14 September 2009 and culminating in the tribunal
- G issuing its award on 4 November 2009.

PRAYERS

- H [22] The plaintiff's application in this OS to set aside the award is mainly on two grounds. One is jurisdictional. It has the twin elements of the tribunal exceeding its jurisdiction on the one hand and exercising its jurisdiction wrongfully on the other. The other ground is that of public policy in that the tribunal breached the rules of natural justice in granting a 'premium' of 10% of investment costs to TLL and HLL when both parties had submitted differently
- I on it, quite apart from the fact that the tribunal ordered the investment costs to be paid to non-parties to the PDA by taking into consideration the evidence of investment costs incurred by HLL, TLP and SEAP under the mining contracts and in that sense wrongfully exercising its jurisdiction over non-parties to the

arbitration agreement.

A

PRINCIPLES

[23] The statutory basis for the plaintiff's application is s 37(1)(a)(iv) and (v), and 37(1)(b)(ii) and 37(2)(b) of the Arbitration Act 2005 ('AA 2005'). The relevant statutory provisions read as follows:

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Section 37 Application for setting aside

(1) An award may be set aside by the High Court only if —

C

(a) the party making the application provides proof that —

...

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

D

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

...

(b) the High Court finds that —

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(i) ...; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where —

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(a) ...; or

(b) a breach of the rules of natural justice occurred —

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

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The breach of the rules of natural justice under the Arbitration Act 2005

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[24] This according to learned counsel for the plaintiff, Mr Cyrus Das, was a secondary point, the substantial point being that of jurisdiction which shall be dealt with shortly. The point taken was that the plaintiff had not been given its right to be heard on the meaning of the term 'premium' in article 15.1 (b) of the PDA when the Arbitral Tribunal, after hearing submissions on the meaning of 'premium' by the defendants and the plaintiff not availing itself of the opportunity to submit on this issue other than objecting to the defendant's submission, decided not to adopt the plaintiff's submission and instead decided that it should be 10% of the investment costs.

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A [25] Article 15.1 of the PDA reads:

In the event of the termination of this Agreement, compensation shall be paid to TLL or the Government, as the case may be, as determined by the arbitration panel constituted in accordance with Article 14 hereof which shall include TLL's total investment cost plus a premium and consideration of the Lenders and Investors in the event of default on the part of the Government.

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C [26] I agree with learned counsel for the defendants, Mr Cecil Abraham, that the Arbitral Tribunal was entitled to interpret the PDA the way it did and that being a matter of construction of an agreement it is essentially a question of law. If I understand Mr Das correctly, he was advancing that the approach that should properly be taken by the Arbitral Tribunal when it accepts neither position taken by either side was to call parties to submit on the intended interpretation that the tribunal wanted to adopt. With the greatest of respect, that is misconceived. The plethora of case law certainly does not support that stand. See *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441 at p 458; *Infineon Technology (M) Sdn Bhd v Orisoft Technology Sdn Bhd (previously known as Orisoft Technology Bhd) and another application* [2011] 7 MLJ 539 at pp 571–573; *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1.

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F [27] Mr Das had referred to the Privy Council case of *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404 but that was in the context where neither party has submitted on the matter and it was the court that had stumbled across it. So too was the Singapore case cited by learned counsel in *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 where a court or tribunal had decided a case on a basis not raised or contemplated by the parties.

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G [28] What is plain is that this ground would not bite unless the most basic notion of morality and justice is offended (*Infineon's* case). The case of *Son Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86, a decision of the Singapore Court of Appeal, cited by Mr Cecil Abraham, is both instructive and illuminating as it is illustrative, at p 119:

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It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. *The arbitrators, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without appraising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him. Similarly, an arbitrator is entitled — indeed, it is his obligation, to come to his own conclusions or inferences from the primary facts placed before him. In this context, he is not expected to inexorably accept the conclusions being urged upon him by parties, neither is he expected to consult the parties on his thinking process before finalising the award unless it involves a dramatic departure from what has been presented to him.*

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Each case should be decided within its own factual matrix. It must always be borne in mind that it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied. (Emphasis added.)

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[29] It is pertinent to note that a breach of the rules of natural justice which constitutes a ground of setting aside an award is expressed as one where the award is in conflict with the public policy of Malaysia. See s 37(1)(b)(ii) of the AA 2005. It is not every breach of the rules of natural justice that would offend the public policy principle. In that sense the dicta of the Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597 is edifying:

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59 Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that *public policy under the Act encompasses a narrow scope*. In our view, it should only operate in instances where the upholding of an arbitral award would ‘*shock the conscience*’ (see *Downer Connect* ([58]) (at [136])), or is ‘*clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public*’ (see *Deutsche Schachbau v Shell International Petroleum Co Ltd* [1987] 2 Lloyd’s Rep 246 at p 254, per Sir John Donaldson MR), or where it *violates the forum’s most basic notion of morality and justice*: see *Parsons & Whittemore Overseas Co Inc v Societe Generale de L’Industrie du Papier (RAKTA)* 1974 508 F 2d 969 (2nd Cir) at p 974. This would be *consistent with the concept of public policy* that can be ascertained from the preparatory materials to the Model Law. As was highlighted in the Commission Report (A/40/17), at para 297 (referred to in A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) at p 914):

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In discussing the term ‘public policy’, it was understood that it was not equivalent to the political stance or international policies of a State but comprised the *fundamental notions and principles of justice* ... It was understood that the term ‘public policy’, which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. (Emphasis added.)

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[30] That disposes of the first point on breach of natural justice. For the avoidance of doubt, I had considered the award of ‘premium’ from the pure standpoint of breach of the rules of natural justice. I shall subsequently consider this part of the award of ‘premium’ from the jurisdictional point. Indeed a greater and graver question is that of excess of jurisdiction which shall now be considered.

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A *The jurisdictional issue under the Arbitration Act 2005*

[31] Learned counsel for the plaintiff, My Cyrus Das, started off by debunking the notion that the AA 2005 under the Model Law regime has advanced and advocated a position of minimum interference by the court. Intervention by the court is specifically provided for under s 37 of the AA 2005 in situations as set out there that would justify a setting aside of an award, be it one arising out of an international arbitration. Such a challenge is to be made in the court where the seat of arbitration which in this case is in Malaysia as agreed by the parties. Malaysian curial law would apply where the seat of arbitration is in Malaysia.

[32] Whilst it is generally stated that under the Model Law regime as reflected in the AA 2005, there is a palpable paradigm shift towards non-interference in international arbitration award especially on issues of error of law so called, yet where jurisdiction is concerned, the Model Law does recognise and respect court's interference where arbitrators have acted outside the scope of the submission and exceeded their jurisdiction and this principle is reflected in s 37(1)(a)(iv) and (v) of the AA 2005.

[33] Across the causeway this cautious approach in this regard is captured in the dicta of the Singapore Court of Appeal in *CRW Joint Operation v PT Perusahaan Gas Negara* [2011] 4 SLR 305 when dealing with the equivalent Singapore provision on excess of jurisdiction at [30–31] as follows:

30. In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR (R) 597, this court held (at [44]) that the court had to adopt a two-stage enquiry in assessing whether an arbitral award ought to be set aside under Article 34(2)(a)(iii) of the Model Law. Specifically, it had to determine:

first, what matters were within the scope of submission to the Arbitral Tribunal; and

second, whether the arbitral award involved such matters, or whether it involved 'a new difference ... outside the scope of the submission to arbitration and accordingly ... irrelevant to the issues requiring determination' (Emphasis added.) (at [40]).

31. It is useful, at this juncture, to set out some of the legal principles underlying the application of article 34(2)(a)(iii) of the Model Law. First, article 34(2)(a)(iii) is not concerned with the situation where an Arbitral Tribunal did not have jurisdiction to deal with the dispute which it purported to determine. *Rather, it applies where the Arbitral Tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it. In other words, article 34(2)(a)(iii) addresses the situation where the Arbitral Tribunal exceeded (or failed to exercise) the authority that the parties granted to it* (see Gary B Born, *International Commercial Arbitration* (Wolters Kluwer, 2009) at vol 2, pp 2606–2607 and 2798–2799). This

ground for setting aside an arbitral award covers only an Arbitral Tribunal's substantive jurisdiction and does not extend to procedural matters (see Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 2009) ('*Singapore Arbitration Legislation*') at p 117). (Emphasis added.)

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[34] Learned counsel for the defendants, Mr Cecil Abraham, pointed out that had paras 25 and 33 of the same judgment been quoted, one would get a more holistic picture of the new paradigm under the Model Law regime:

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25 The court's power to set aside an arbitral award is limited to setting aside based on the grounds provided under article 34 of the Model Law and s 24 of the IAA. As declared by this court in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ('Soh Beng Tee') at [59], *the current legal framework prescribes that the courts should not without good reason interfere in the arbitral process. This policy of minimal curial intervention by respecting finality in the arbitral process acknowledges the primacy which ought to be given to the dispute resolution mechanism that the parties have expressly chosen ...*

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it is trite that mere errors of law or even fact are not sufficient to warrant setting aside an arbitral award under article 34(2)(a)(iii) of the Model Law (see *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 ([at [19]–[22])). In the House of Lords decision of *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221, which concerned an application to set aside an arbitral award on the ground of the Arbitral Tribunal's 'exceeding its powers' (see s 68(2)(b) of the Arbitration Act 1996 (c 23) (UK) ('the UK Arbitration Act')), Lord Steyn made clear (at [24]–[25]) the vital distinction between the erroneous exercise by an Arbitral Tribunal of an available power vested in it (which would amount to no more than a mere error of law) and the purported exercise by the Arbitral Tribunal of a power which it did not possess. Only in the latter situation, His Lordship stated, would an arbitral award be liable to be set aside under s 68(2)(b) of the UK Arbitration Act on the ground that the Arbitral Tribunal had exceeded its powers. In a similar vein, article 34(2)(a)(iii) of the Model Law applies where an Arbitral Tribunal exceeds its authority by deciding matters beyond its ambit of reference or fails to exercise the authority conferred on it by failing to decide the matters submitted to it, which in turn prejudices either or both of the parties to the dispute (see above at [31]). (Emphasis added.)

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[35] The English Supreme Court has recently put in proper perspective and proportion the position and power of the court when a jurisdictional point is taken at setting aside of the award stage. It corrects the prevalent proposition that arbitrators have the sole and exclusive right to decide their own jurisdiction under Model Law principles or under the general principle of competence-competence. In *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763, Lord Collins observed (at [84–85]) as follows:

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A 84. So also the principle that a tribunal in an International Commercial Arbitration has the power to consider its own jurisdiction is no doubt a general principle of law. It is a principle which is connected with, but not dependent upon, the principle that the arbitration agreement is separate from the contract of which it normally forms a part. *But it does not follow that the tribunal has the exclusive power to determine its own jurisdiction, nor does it follow that the court of the seat may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it. Nor does it follow that the question of jurisdiction may not be re-examined by the supervisory court of the seat in a challenge to the tribunal's ruling on jurisdiction.* Still less does it mean that when the award comes to be enforced in another country, the foreign court may not re-examine the jurisdiction of the tribunal.

C 85. Thus article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration provides that the Arbitral Tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. But by article 34(2) an arbitral award may be set aside by the court of the seat if an applicant furnished proof that the agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the seat (and see also article 36(I)(a)(i). (Emphasis added.)

E [36] I agree with learned counsel for the plaintiff that the term 'supervisory court' used by Lord Collins refers to the court of the seat of arbitration. It is the only court that may set aside the award. In other words, it is a jurisdiction that may not to be exercisable by the enforcement courts.

F [37] This approach is clearly contemplated by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 which is statutorily recognised by our AA 2005 (see our s 38(4)). By article V(1)(e) (see our s 39(1)(a)(vii)) of the New York Convention, an award is not enforceable if the award has been set aside 'by a court of the country in which, or the law of which, the award was made'.

G [38] The plaintiff's learned counsel also referred to the US Court of Appeals for the second circuit in *Yusof Ahmed v Toys 'R' Us* 126 F 3d 15 which spoke of the country of origin possessing 'an exclusive competence' to set aside the award. It observed at HN 13:

H An action to set aside an award can be brought only under the domestic law of the arbitral forum and can never be made under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (convention), June 10, 1958, 21 UST 2157, which is not applicable for setting aside awards. The court of the country of origin of the award is the only court competent to rule. The convention is not applicable in the action for setting aside the award. These provisions affirm the well established principle of current international commercial arbitration *that the court of the country of origin is exclusively competent to decide on the setting aside of the award. The fact is that setting aside awards under the New York convention can take place only in the country in which the award was made.* (Emphasis added.)

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[39] As is often said a foreign court is entitled to enforce the award within its jurisdiction so long as the domestic court has not set aside or suspended the award, but will not act if the award is nullified in the country in which it was made: see *Termorio SA v Electranta SA* 487 F 3d 928. A

[40] It was precisely for this reason that when the US District Court, (Southern District) of New York deferred to the decision of the arbitrators as to their jurisdiction, it declined to do an independent review and confirmed the award for enforcement purposes (see Para III pp 21–22 of US court’s judgment). In follow-up enforcement proceedings in London in the Queens Bench Commercial Court, Justice Eder, specifically observed as follows, when granting a stay on terms of the enforcement proceedings, (at [27]): B C

Of course, I am not deciding now, finally, that it is valid. As I have said, there are pending proceedings in the Malaysian court, *which is the supervisory court where the arbitration took place and, ultimately, whether or not this award is valid or not is a matter for that court, not for this court.* (Emphasis added.) D

[41] It affirms the position stated in our s 39(1)(a)(vii) that while the enforcement court may act to enforce an award that is still extant, it is only the supervisory court being the court of the seat of arbitration that may set aside the award. E

[42] I am aware of the fact as alluded to and alerted by Mr Cecil Abraham for the defendants that in enforcement proceedings in the US courts and the High Court of England, the judges there had expressed their opinions that they do not consider the issues raised by Laos there as questions that go to jurisdiction. F

[43] It is for this court being the court of the seat of arbitration to decide on the setting aside of the award on the ground of excess of jurisdiction. G

Whether the challenge on jurisdiction of the Arbitral Tribunal can in the circumstance of this arbitration be made at the setting aside stage.

[44] The main brunt of the challenge of the arbitral award is that the Arbitral Tribunal has exceeded its jurisdiction. This ground on jurisdictional challenge is captured in s 37(1)(a)(iv) and (v) of the AA 2005. The word ‘jurisdiction’ is a loaded word. The framers of the AA 2005 drawing their inspiration from the Model Law had used a more layman’s expression of ‘not contemplated by or not falling within the terms of the submission to arbitration’ or that of ‘beyond the scope of the submission to arbitration’. Clearly s 37(1)(a)(v) is a corollary to and a consequence of (iv). Old habits die hard and legal authors prefer a single word to express this concept of setting aside an award by use of the word ‘Jurisdiction’. H I

A [45] Learned counsel for the plaintiff, Mr Cyrus Das, referred the court to a helpful passage in the *Law and Practice of International Commercial Arbitration* by Alan Redfern and Martin Hunter, (4th Ed), London, Sweet & Maxwell, 2004 where at p 248 the learned authors explained 'jurisdiction' in the context of setting aside an arbitral award as follows:

B *An Arbitral Tribunal may only validly determine those disputes that the parties have agreed that it should determine.* This rule is an inevitable and proper consequence of the voluntary nature of arbitration. In consensual arbitration, *the authority or competence of the Arbitral Tribunal comes from the agreement of the parties; indeed, there is no other source from which it can come.* It is the parties who give to a private tribunal the authority to decide disputes between them; and the Arbitral Tribunal must take care to stay within the terms of its mandate. The rule to this effect is expressed in several different ways. Sometimes it is said that an Arbitral Tribunal must conform to the mission entrusted to it; or that it must not exceed its mandate; or that it must stay within its terms of reference, competence or authority. Another way of expressing the rule (which is followed in this book) is to state that an *Arbitral Tribunal must not exceed its jurisdiction (this term being used in the sense of mandate, competence or authority).* (Emphasis added.)

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E [46] Learned counsel for the plaintiff submitted what to him was manifestly clear, that the impugned arbitral award was under the PDA and not under the mining contracts. The defendants did not mount any challenge over the termination of the mining contracts by Laos' letter of 11 October 2006. Thus Mr Cyrus Das for the plaintiff stated as a matter of fact that the mining contracts therefore remained unadjudicated.

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G [47] I can appreciate the argument that when the reference to arbitration and the very pleading of the defendants is the dispute arising from the termination of the PDA, then the scope of arbitration must necessarily be confined to the PDA. The Arbitral Tribunal appeared to have appraised and indeed affirmed this in its Procedural Order No 1 issued which reads as follows:

H claimants (TLL/HLL) assert jurisdiction pursuant to Art 14 of a Project Development Agreement dated 22 July 1994 (the PDA) executed between the 1st claimant and the respondent.

I [48] Mr Cyrus Das emphasised the fact that article 14.1 of the PDA is limited in its application to only signatories of the PDA for it states that 'either party' may submit the dispute to arbitration. It contains no facility for the impleading of third parties or non-signatories in the arbitration. In short, article 14.1 provides only for a party-based arbitration.

[49] The substantive submission of the plaintiff is the serious allegation that the arbitrators have strayed beyond the scope of the arbitration on both the

issue of liability and remedy. It is the error of jurisdictional excess encapsulated by learned counsel as follows: **A**

- (a) wrongfully exercised jurisdiction over Laos's disputes with TLL and HLL under the mining contracts and were without jurisdiction to award TLL and HLL a return of their investment costs made under the mining contracts; **B**
- (b) while exercising jurisdiction under the arbitration agreement of the PDA, the arbitrators wrongfully exercised jurisdiction over the Siva companies ie TLP and SEAP that were not signatories to the PDA by amalgamating their costs with TLL's costs in awarding damages under the PDA; **C**
- (c) the arbitrators failed to address the issue of breaches of Laotian law although on the pleadings; and
- (d) granted a 'premium' of 10% of investment costs, a sum of USD4m, to TLL and HLL. **D**

[50] The Court of Appeal in the earlier round on this dispute, when hearing the plaintiff's appeal and granting extension of time for this application to set aside the arbitral award to be filed, succinctly summarised the jurisdictional challenge in this wise (at [35]): **E**

35. In the present case the Appellant challenged the arbitral award based on the following grounds: **F**

- (a) that the arbitrators had exceeded their jurisdiction by exercising jurisdiction over the Appellant's disputes with the respondents under the mining contracts which are governed by law of Laos and in respect of which the arbitrators have no jurisdiction; **G**
- (b) that the arbitrators wrongly exercised jurisdiction over non parties in respect of a dispute that was, and remained a dispute between the Appellant and the 1st respondent pursuant to Article 14 of the PDA. The arbitrators erroneously decided that the 2nd respondent was a party to the arbitration proceeding; and **H**
- (c) that the arbitrators awarded investment costs against the Appellant to be paid to non-parties of the PDA by taking into consideration the evidence of investment costs incurred by the 2nd respondent, Thai-Lao Power Co. Ltd and South East Asian Power Co. under the mining contract; thus the award was bad ex facie as it contained costs and damages beyond the scope of the submission of the parties under the PDA. **I**

[51] While the Court of Appeal had gone on to observe that these grounds were 'cogent reasons for the challenge', it remains for this court in the hearing

A proper of this application, to be independently satisfied that this is so, giving due deference though not under a duty to be bound by the observation made below (at [36]):

B 36. These are good reasons to extend time as applied for bearing in mind the cogent reasons for the challenge; the great prejudice to the appellant if the application is dismissed without considering the substantive application on its merits; the fact that the respondents would be compensated by the payment of interest if the application is incorrectly entertained and the further fact that the respondents are well aware, from the opposition to the enforcement applications taking place in other jurisdictions, that the appellant is challenging the award.

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D [52] Learned counsel for the respondents, Mr Cecil Abraham, cautioned that the issue of jurisdiction was only raised for the first time at the setting aside stage and also in the plaintiff's various applications to resist the enforcement of the arbitral award in other jurisdictions such as in the United States of America and in England. He was equally clear that parties must raise any objection to jurisdiction at the very outset of the arbitration. He drew the court's attention to s 18(3) of the AA 2005 which reads:

E 18 Competence of Arbitral Tribunal to rule on its jurisdiction.
(3) A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.

F [53] However, learned counsel for the plaintiff, Mr Cyrus Das, argued that the plaintiff was at pains to point out by way of repeated references to the arbitrators that HLL and the mining contracts cannot be the subject of an arbitration under the PDA. In its defence statement, Laos asserted that TLL cannot bring claims under the mining contracts (see para 3.1.2) and by footnote (97) in relation thereto, Laos stated that the tribunal could have no jurisdiction over HLL or claims under the mining contracts. This was reasserted by Laos in its opening memorial that HLL was not a party to the PDA (para 3.1).

H [54] Laos had asserted before the Arbitral Tribunal that the termination clause (article 15.1) of the PDA providing for prior-arbitral approval to terminate the PDA has no application to the mining contracts (para 7.1). The termination clause was described by TLL in its claim statement as fundamental to its case (see para 5.1.1).

I [55] Laos also argued that the mining contracts were governed by Laotian Law (para 7.2) which was to say that the arbitrators would lack the jurisdiction to apply New York Law to any matter relating to the mining contracts. At para 2.3 of its closing memorial, Laos once again asserted that HLL was not a party to the PDA and has no right to enforce its terms.

[56] According to Mr Cyrus Das for the plaintiff, there is no doubt that the arbitrators recognised the jurisdictional challenge before them. This may be seen in paras 54, 56 and 62–63 of the award. In para 62 the arbitrators record the objection that ‘HLL has no right to enforce the PDA’.

A

[57] Be that as it may, learned counsel Mr Cecil Abraham contended that it was not enough for the plaintiff as the respondent in the arbitration to have merely raised the objection on jurisdiction in its pleadings. To a question from the court during his oral submission, he seemed to have taken the position that no matter how vigorous and rigorous the objection to jurisdiction is taken, the party objecting on ground so basic as jurisdiction must proceed to press the Arbitral Tribunal for an award on jurisdiction against which it ought then to appeal to the court where the seat of arbitration is. He drew support from the dicta of Belinda Ang J in *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others* [2013] 1 SLR 636 at p 77 where Her Ladyship dealt with the issue of jurisdiction and when such an argument should be raised exhaustively as follows:

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[15] The simple point is this: if a party fails to appeal or decides not to appeal an award on jurisdiction, the award will be treated as final between the parties and the hearing on the merits will proceed on the basis (and not simply the assumption) that the tribunal has jurisdiction. Challenging such an award on jurisdictional grounds is thus excluded from the grounds which a party may invoke at the setting-aside or the enforcement stage if the party has chosen not to bring an appeal under article 16(3) if a party wishes to properly and effectively retain its right to raise an objection to the tribunal’s jurisdiction under the IAA — a party wishing to oppose a jurisdictional award must act ...

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[58] The above observation appears to be one made in the context where the Arbitral Tribunal has made an award on jurisdiction and not one where an award has been made on the merits. For context and with that hopefully a more complete and clear picture as to the options available to an Arbitral Tribunal when the issue of jurisdiction is raised, it would be apposite for me to reproduce s 18(3)–(10) of our AA 2005:

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18 Competence of arbitral tribunal to rule on its jurisdiction

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- (3) A plea that the arbitral tribunal *does not have jurisdiction shall be raised not later than the submission of the statement of defence.*
- (4) A party is not precluded from raising a plea under subsection
- (3) by reason of that party having appointed or participated in the appointment of the arbitrator.
- (5) A plea that the arbitral tribunal is *exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.*

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- A (6) Notwithstanding subsections (3) and (5), the arbitral tribunal may admit such plea if it considers the delay justified.
- (7) The arbitral tribunal may rule on a plea referred to in *subsection (3) or (5)*, either as a *preliminary question* or in an *award on the merits*.
- B (8) Where the arbitral tribunal rules on such a plea as a *preliminary question that it has jurisdiction*, any party may, *within thirty days after having received notice of that ruling appeal to the High Court to decide the matter*.
- (9) While an appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.
- C (10) No appeal shall lie against the decision of the High Court under subsection (8). (Emphasis added.)

D [59] The learned authors Sundra Rajoo and WSW Davidson in *The arbitration Act 2005 UNCITRAL Model Law as applied in Malaysia*, Sweet & Maxwell Asia, Malaysia, 2007 at p 87 have this to say in their commentary to the AA 2005:

E 18.7 Whenever there is a jurisdictional challenge, an arbitrator who can decide on his own jurisdiction has three alternative courses of action. First, he may determine that he has no jurisdiction at all particularly where the lack of jurisdiction is evident, in which event the arbitral proceedings will terminate in the absence of a court order to the contrary. Secondly, he may determine that he has jurisdiction and issue an interim award, in which event either party or both parties may challenge the award in the manner provided for under the relevant legislation or rules and seek a pronouncement from a competent court or authority as to the jurisdictional issue.

F Finally, he may continue with the arbitration without adopting either of the courses above until stopped by an order from a competent court.

[60] The learned authors commented as follows at p 89:

G 18.15 The failure to raise a plea as to the tribunal exceeding the scope of its mandate would not necessarily preclude raising such a plea in setting aside or in recognition and enforcement proceedings as section 37(1)(a)(iv) and (v) of the Act permits the setting aside of the award on these grounds. See commentary at paragraph 37.11 below.

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[61] The learned authors Redfern and Hunter have at p 257 commented clearly on the options available to an Arbitral Tribunal once a challenge on jurisdiction is mounted by a party:

I As the practice of international commercial arbitration becomes more sophisticated, challenges to the jurisdiction of Arbitral Tribunals become more frequent. It is useful to consider the alternatives open to an Arbitral Tribunal faced with a challenge to its jurisdiction. In effect, the Arbitral Tribunal has three choices:

- to decide at the outset that it has no jurisdiction; or

- to issue an interim award on jurisdiction; or
- to join the issue of jurisdiction to the merits.

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... There is a third class of cases in which *the issue of jurisdiction depends on facts which are so closely connected with the merits of the dispute that it is almost impossible to determine the one without determining the other. In such cases, the Arbitral Tribunal usually joins the issue of jurisdiction to the merits.* (Emphasis added.)

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[62] Further at p 258, the learned authors Redfern and Hunter continued:

Any award on jurisdiction made by an arbitral tribunal, whether as an interim or final award, is binding on the parties to the arbitration. However, it may be set aside by a competent court and it may be refused recognition or enforcement. This is the principle adopted in the Model Law with regard to both setting aside and refusal of recognition or enforcement; it is also the principle adopted in the New York Convention with regard to the recognition and enforcement of awards.

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[63] With respect to the options available to a party challenging the jurisdiction of an Arbitral Tribunal established contrary to its assertion that the tribunal has no jurisdiction, the party has four options according to Redfern and Hunter at p 259:

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- boycott the arbitration;
- raise the objections with the tribunal;
- apply to the national courts to resolve the issue; or
- *challenge the award, once it has been made.* (Emphasis added.)

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[64] With respect to the fourth option the learned authors Redfern and Hunter at p 261 have explained the scenario as follows:

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The fourth course of action is for the respondent to *participate in the arbitration, and to remain passive until after the final award has been issued by the arbitral tribunal. It may then either challenge the award in the courts of the country in which the arbitration took place* or, alternatively, refuse to implement the award and wait for the successful claimant to attempt to enforce it. When such an action for enforcement is taken, the losing party might then argue the objections to jurisdiction as a ground for refusal of enforcement.

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[65] From the reading of the award and in particular paras 54, 56 and 62–63 it would appear that the Arbitral Tribunal had proceeded with the option of joining the issue of jurisdiction to the merits and the respondent there, Laos, had chosen the option of having raised the objection, to then proceed to participate in the proceedings and only to challenge the award after it has been made.

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A [66] I must say that what Laos did was a perfectly legitimate course available to it which option it has availed itself of. I am conscious of s 7 which provides as follows:

Section 7 Waiver of right to object

B A party who knows —

- (a) of any provision of this Act from *which the parties may derogate*; or
- (b) that any requirement under the arbitration agreement has not been complied with,

C and yet proceeds with the arbitration without stating its objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived its right to object.

D [67] The learned authors Sundra Rajoo and WSW Davidson at p 32 circumspectly commented on s 7(a) as follows:

It should also be noted that this section will not in our view apply to jurisdictional objections, which are dealt with by section 18 of the Act ...

E and in their commentary on s 18 of the AA 2005 at p 89, it was observed as follows:

F 18.6 Section 18(3) to (6) does not state what the consequences of failure to raise a plea of no jurisdiction are. However, section 7 which deals with waiver of the right to object, does not apply in this case because section 18 is not a provision from which the parties may derogate (section 7(a)).

G [68] I am therefore of the opinion that the plaintiff having raised its objections timeously before the Arbitral Tribunal, is validly justified in raising the jurisdictional challenge at this stage of setting aside the award. Where the AA 2005 provides under s 37(1)(a)(iv) and (v) the grounds for setting aside an award on excess of jurisdiction and where the Arbitral Tribunal had proceeded under s 18(7) to deliver an award on the merits instead of as a preliminary question or an interim award on jurisdiction, the plaintiff is perfectly positioned and hence permitted to raise the jurisdictional challenge at this stage of setting aside the award.

Whether the challenge of jurisdiction has been waived by the conduct of the plaintiff

I [69] While we have often heard that parties cannot by consent or conduct confer jurisdiction on a court, the same is not so where jurisdiction of an Arbitral Tribunal is concerned. An Arbitral Tribunal derives its jurisdiction from the arbitration agreement entered into by the parties with respect to the

scope of the dispute being referred to arbitration. Granted that scope can at times be a subjective matter and so susceptible to different interpretations, parties can still by agreement refer specific matters for an Arbitral Tribunal to decide. However there are times when a party refers a matter for the Arbitral Tribunal to decide and the other party raises the issue that the matter does not come within the scope of arbitration as contained in the arbitration agreement entered into before the dispute has arisen. Would the passive participation of the objecting party preclude that party from being able to raise the jurisdictional challenge at the setting aside stage of the award on ground of estoppel, waiver and acquiescence by conduct? As was underscored by the Court of Appeal in *Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545 at p 561:

To begin with, it is important to recognise that the foundation of an arbitrator's jurisdiction is the agreement entered into between the disputants. Absent such an agreement, there is no jurisdiction. And as a general rule *mere participation in proceedings before an arbitrator does not cure any jurisdictional defect. Accordingly, a party who appears with or without protest and takes part in proceedings before an arbitrator is not precluded from later challenging the award of such arbitrator on the ground of lack of jurisdiction.* (Emphasis added.)

[70] His Lordship Gopal Sri Ram JCA (as he then was) in *Bauer's* case at p 562 then proceeded to set out the scholarship of learned judges and authors on this subject at p 562 as follows:

Thus in *Dawes v Price* (1865) 34 LJQB 8 at p 9 one finds Pollock CB, saying:

I cannot distinguish, in my own mind, between a man being a judge and a man being a judge quo ad hoc. I do not see why — if an arbitrator deals with a matter beyond his jurisdiction, and the party protests, doubting the arbitrator's authority, and yet goes on to take care of his own interests as he best can, saying, I am not sure that you are right — he is bound by the award. Why is he disentitled to protect himself from the consequences of his own view as to the arbitrator's authority being wrong? I think it a much more difficult question whether the defendant could have availed himself of a decision in his favour.

Again, in *Waverly Jute Mills Co Ltd v Raymon & Co* AIR 1963 SC 90 at p 97, Venkatarama Aiyar J said:

Now an agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests and where that is not in existence, at the time when they enter on their duties, the proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties to those proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction. But in such a case there is nothing to prevent the parties from entering into a fresh agreement to refer the dispute to arbitration while it is pending adjudication before the arbitrators, and in that event the

A proceedings thereafter before them might be upheld as referable to that agreement and the award will not be open to attack as without jurisdiction.

B That a party may lie still and defend himself from the summary enforcement of an award on the ground that the arbitrator lacked jurisdiction was recognised by the Federal Court in *State Government of Sarawak v Chin Hwa Engineering Development Co* [1995] 3 MLJ 237, where Edgar Joseph Jr FCJ said (at p 244F-I):

C We agree, that in certain circumstances, *a party may avail himself of a passive remedy by which is meant he does not take the initiative to attack an award, but simply waits until his opponent seeks to enforce the award by action or summary process, when he resists enforcement.* Mustill and Boyd on *Commercial Arbitration* (2nd Ed), at p 546 have instanced two situations when the passive remedy would be available; namely:

- D (1) where the award is so defective in form or substance that it is incapable of enforcement;
- (2) where the whole or part of the award is ineffective, on the ground that the relief granted lies outside the jurisdiction of the arbitrator.

E In the circumstances, we agree with the submission of the attorney general that it was open to the employer to have had recourse to the passive remedy of resisting the enforcement proceedings under s 27 of the Act by relying on its complaint that the arbitrator had no jurisdiction to determine the validity of the suspension order and, consequently, no jurisdiction to award damages for alleged wrongful suspension, these being matters in dispute which were outside the scope of cl 43 of the contract. Whether or not the employer is entitled to succeed in this contention is, of course, a separate matter, and it is to this question that we must now direct our attention. (Emphasis added.)

F

G [71] It would appear that having raised a jurisdictional objection in one's pleading or by way of letter to the Arbitral Tribunal or during the preliminary hearing, one may still passively participate in the arbitral proceedings though that may not be preferred, for like all concepts centering around consent, one may run the risk of being precluded from raising the jurisdictional challenge later in the setting aside stage on ground of consenting as in a fresh agreement for the Arbitral Tribunal to decide on the matter nevertheless. Herein lies the vexed question that one would often have to wrestle with: having participated in the proceedings be it purposefully and even politely to completion with a delivery of an award, can one properly set aside an award on ground of jurisdictional challenge or is one precluded from so doing? Is it a matter of degree and extent of one's participation in the areas where the jurisdiction of the Arbitral Tribunal is being challenged?

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[72] In *Bauer's* case, the Court of Appeal had no problem dismissing the jurisdictional challenge as the respondent went beyond passive participation to

active invitation to the arbitrator to decide on the disputed matters that go to jurisdiction of the arbitrator. As was stated at pp 563–564:

But I cannot help but notice that the cases where the rule has been applied with unbending strictness are concerned with the jurisdiction of either the ordinary courts or statutory tribunals or other creatures of statute. We are here not concerned with an adjudication by such a tribunal. We are here concerned with the private and consensual adjudication of disputes. It appears a little odd to me that if parties may agree to refer some of their disputes to an arbitrator selected by them that either of them cannot by words or conduct acquiesce to have the same arbitrator decide other disputes between them although these are not covered by their original agreement. And if one of them chooses to do so, he may, in my view be estopped from later asserting that the arbitrator lacked jurisdiction.

I find support for the view I take of the matter from the following passage in *The Law and Practice of Commercial Arbitration in England* by Mustill and Boyd (2nd Ed), at pp 133–134 which I quote with approval:

Most agreements to refer existing disputes to arbitration are made expressly, and usually in writing rather than orally. But an agreement to arbitrate a dispute and to be bound by the arbitrator's award may be inferred from the conduct of the parties without any express agreement. *The most usual case of such an agreement is where an arbitration is already in progress under an existing express agreement and a fresh claim is brought before the arbitrator, which is outside the scope of the original agreement.* If no objection is made to the arbitrator's lack of jurisdiction to deal with the fresh claim, both parties will be bound by an award on the merits of the claim. The arbitrator's authority to make such an award derives from an agreement to be inferred from the conduct of the parties. (Emphasis added.)

That, I think, is the position in the present instance. *This is not a case where the respondent, having taken issue with the arbitrator's jurisdiction, merely proceeded to participate in the proceedings before him. Had this been the case, it would have been most difficult for the appellant to make the submission it has made before us.* For the matter would have been concluded by a long and unbroken line of authority, including such cases as *Davies v Price*.

But the respondent went considerably further. As may be recalled, the respondent amended its pleading on 22 February 1998, and alleged that the matters in dispute between the parties had been settled and *claimed a declaration to that effect.* This was a matter certainly outside the scope of the arbitration agreement. On 27 February 1998 it wrote to the arbitrator inviting him to decide the facts pleaded in the amendment as a preliminary issue on the ground that it would finally dispose of the arbitration. These actings of the respondent threw open the enforceability by the appellant of its claim under the eight work orders that fell outside the scope of the arbitration clause. *Having thus invited the arbitrator to deal with the very issue which it had previously contended the arbitrator had no jurisdiction to decide, the respondent must be taken as having elected to abandon its earlier challenge to the arbitrator's jurisdiction.* (Emphasis added.)

[73] Mr Abraham for the defendants submitted that the plaintiff as the

A respondent in the arbitration had participated passionately in the arbitration by filing and prosecuting a counterclaim. He submitted forcefully and firmly that that must be viewed as a submission to the tribunal's jurisdiction. To that Mr Cyrus Das for the plaintiff pointed out that it was a qualified participation, queer as it may seem. Paragraph 11 of the counterclaims reads:

B Given the uncertainty as to identity and standing of the various claimants and potential claimants, the GOL is uncertain of the parties against whom it should assert its counterclaims. Accordingly, the GOL sets forth in this section descriptions of its counterclaims, rather than particular claims against particular parties and reserves the right to later identify the respondent or respondents to particular claims.

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[74] Viewed objectively, I do not think that the plaintiff had gone beyond the point of no-return where estoppel, acquiescence and waiver is concerned, bearing in mind that it had raised its objection to the Arbitral Tribunal exercising jurisdiction over the mining contracts which are governed by the law of Laos, over non-parties to the arbitration agreement in the second respondent HLL and in awarding investment costs to non-parties of the PDA in its defence as well as opening and closing memorials.

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E [75] Appreciating that this area of challenge may be a thorny problem the AA 2005 has descended on a time frame to raise a jurisdictional challenge under s 18(3) and (5) and giving room to the Arbitral Tribunal to exercise its discretion to admit such plea beyond the time prescribed which is event-based if the delay is justified. The Arbitral Tribunal may even proceed to join issue of jurisdiction to the merits and proceed to deal with it in the final award delivered as is clearly in this case from a reading of a few selective paragraphs of the award reproduced below:

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On liability the tribunal concluded as follows:

G Para 65

H The tribunal agrees with Claimants that they have standing to bring these claims. TLL is a party to and HLL is an intended beneficiary of the PDA. There is no evidence that either of them has assigned away its rights to do so. As we appreciate Lao law, it requires only that the company intended to operate the eventually completed facilities maintain an investment license, and TLP was so licensed at all relevant times.

Para 86

I The tribunal therefore concludes that respondent breached the PDA by improperly depriving Claimants of their rights to proceed with performance and did not properly terminate the PDA.

On damages, the tribunal concluded as follows:

Para 92

The tribunal therefore finds that the Claimants' rights under the PDA were taken from them by an improper attempt to terminate the PDA, that respondent is liable to claimants for any damages caused by that action, and that the PDA now is effectively at an end and should be declared to be terminated as a result of this proceeding, as Claimants have requested.

Para 96

Claimants submitted claims for damages under two headings: (a) their costs incurred for the Hongsa Project through 31 December 2007, which Grant Thornton Specialist Advisory Services Ltd. ('Grant Thornton'), an independent member firm of the international accounting firm of that name, calculated initially as U.S.\$179 million (the 'Hongsa Project Investment Cost Report,' Ex. C-178), and (b) a calculation of the net present value of the Hongsa Project over its lifetime, on the assumption of either 720 MW or 1,800 MW installed capacity (the 'Hongsa Project Valuation Reports,' Ex. C-179 and C180), the net present value of which, as of the end of 2008, was computed by Grant Thornton prior to hearing to be either U.S.\$153.5 million (720 scenario) or U.S.\$387 million (1,800 MW scenario). Claimant ultimately relied on the 1,800 MW scenario.

Para. 107

Section 15.1 of the PDA governs compensation in the event of termination of the PDA for breach:

In the event of termination of this Agreement, compensation shall be paid to TLL or the Government, as the case may be, as determined by the arbitration panel constituted in accordance with Article 14 hereof which shall include TLL's total investment cost plus a premium and consideration of the Lenders and Investors in the event of a default on the part of the Government.

Thus, 'in the event of a default on the part of the Government,' as here, Section 15.1 provides that compensation shall be paid to TLL 'which shall include TLL's total investment cost plus a premium and consideration of the Lenders and Investors.'

Para. 108

In construing the terms of Section 15.1 ((a) 'TLL's total investment cost'); (b) 'plus a premium'; and (c) 'consideration of the Lenders and Investors'), we apply New York law as provided by Section 18.1 of the PDA.

[76] It is apposite now to address the specific challenges to jurisdiction.

Specific jurisdictional challenge — assuming jurisdiction over disputes arising under the mining contracts when the arbitration was under the PDA

[77] It cannot be gainsaid that the mining contracts and the PDA are

A separate contracts with substantially significant differences between them. The applicable law under the mining contracts was Laos law as provided by cl 2 thereof. In contrast to the mining contracts, the proper law of the PDA was a mixture of Laotian Law and New York. Article 18 of the PDA reads as follows:

B 18.1. Governing Law. THE LAW OF THE LAO PEOPLES DEMOCRATIC
C REPUBLIC SHALL APPLY (I) WITH RESPECT TO THE AUTHORIZATION
AND EXECUTION OF THIS AGREEMENT BY THE GOVERNMENT, (II)
D WITH RESPECT TO THE FIL IN FORCE ON THE DATE OF EXECUTION
E OF THIS AGREEMENT BY THE GOVERNMENT, (III) WITH RESPECT
TO ANY OF THE LAWS OF THE LAO PEOPLE'S DEMOCRATIC
REPUBLIC AND THE SPECIFIED CONSENTS SPECIFICALLY REFERRED
TO BY NAME IN THIS AGREEMENT AS BEING APPLICABLE, AND (IV)
WITH RESPECT TO THE LEASE AND THE MINERAL RIGHTS DEED.
WITH RESPECT TO OVERALL GOVERNING LAW AND
CONSTRUCTION AND TO ALL OTHER MATTERS NOT SPECIFICALLY
MENTIONED IN THE PRECEDING CLAUSES (I)-(IV), THIS
AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED IN
ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK,
UNITED STATES OF AMERICA, WITHOUT REFERENCE TO
PRINCIPLES OF CONFLICT OF LAWS, UNLESS OTHERWISE AGREED
TO BY BOTH PARTIES HERETO ...

[78] The dispute settlement mechanism is also different in that under cl 31 thereof, the dispute settlement was to be by way of reference to the Laotian Board of Economic Conciliation or Laotian Court or International Dispute Settlement Organisation. The Arbitral Tribunal for deciding the dispute is also different. Though it may be argued, as learned counsel for the defendants Mr Cecil Abraham did, that KLRCA is a member of Int Economic Dispute Settlement Organisation, yet parties express consent must be had first as the clause for arbitration under the mining agreements provided for a few options with respect to the place and the mechanism for arbitration and with that the rules for it.

[79] I can appreciate the plaintiff's submission that, as a matter of intent, it is unthinkable that Laos had agreed through article 14.1 of the PDA to arbitrate HLL's claims under the mining contracts. Only Laotian Law applied to the mining contracts. It would be a breach of the spirit as well as the manifest understanding of the parties for claims under the mining contracts to be decided by New York Law.

I [80] I agree with Mr Das that the arbitrators seemed oblivious to the obvious fact that Laotian law applied to the mining contracts and that it provided for a Laos dispute mechanism. Admittedly, the arbitrators had allowed the choice of law and the dispute mechanism under the mining contracts to be by-passed or circumvented by de facto enlarging the arbitration clause under the PDA or by

admitting the American doctrine of an intended beneficiary or third party beneficiary, which shall be referred to shortly.

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[81] There is merit in the plaintiff's submission that the arbitrators failed to address their mind, as they were obliged to, to the question whether the American doctrine can be applied to override or discard Laotian law which was the proper law of the mining contracts. In the words of Mr Das for Laos, this is what happened because it was by this sidewind that the alleged lost investments under the mining contracts incurred by TLL, HLL and the other Siva companies were admitted into the PDA.

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[82] Reading the award as a whole, the Arbitral Tribunal seemed to have lumped together or co-mingled the claims and disputes under the mining contracts with the claims and disputes under the PDA. The Arbitral Tribunal might have on ground of efficiency or expediency decided the whole of the dispute between the parties under the PDA as if the rights of the parties under the mining agreements have been subsumed into the PDA. While there may be interlinking and indeed interlocking elements between the mining contracts and the PDA, it is safe to say that the parties had intended their respective rights under the mining contracts to remain 'in full force and effect and undisturbed' (see article 19.3) as provided specifically in the PDA. The PDA itself recognises the mining contracts as separate from the PDA and it cannot simply be said to be subordinated to the PDA or be subsumed under the PDA. It has a life of its own and while some of its rights may have been enlarged under the PDA, it is substantially and singularly structured to stand on its own. Article 19.13 further emphasised lest errors might arise in the future that 'HLL rights and benefits under the mining contracts shall remain intact'. Leaving no room for doubts, article 19.11 of the PDA clarified and confirmed that 'both parties acknowledge the existence and continuing validity of the (mining contracts)'.

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[83] I find the following passage in the Indian Supreme Court case of *Bharat Coking Coal Ltd v M/s Annapurna Construction* AIR 2003 SC 3660 helpful in this regard:

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21. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, *the role of the arbitrator is to arbitrate within the terms of the contract*. He has no power apart from what the parties have given him under the contract. *If he has travelled beyond the contract, he would be acting without jurisdiction*, whereas if he has remained inside the parameter of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the records. (Emphasis added.)

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[84] By assuming jurisdiction over disputes arising out of the mining agreement in an arbitration under the PDA, the Arbitral Tribunal had gone beyond the scope of the submission to arbitration. The consequence is that

A there is nothing left to be arbitrated and adjudicated at all under the mining agreement as the claimants/defendants under the PDA arbitration had obtained the whole of their reliefs.

B *Specific jurisdictional challenge — admitting claims by TLL and HLL under the mining contracts when the arbitration was under the PDA*

C [85] Learned counsel Mr Cyrus Das submitted that on liability, the Arbitral Tribunal committed a patent jurisdictional error in admitting TLL/HLL's claims under the mining contracts to be awarded as recoverable costs under a PDA arbitration. The Arbitral Tribunal had exercised jurisdiction by virtue of the arbitration cl in the PDA and it had stated so in their Procedural Order No 1. The Arbitral Tribunal cannot exercise jurisdiction over the mining contracts unless the parties and in this case, Laos had consented to it. Laos had not and in fact Laos had said in its defence as well as its opening memorials and closing memorials that the tribunal has no jurisdiction over the claimants' claims under the mining contracts. What had happened in reality was that claims properly due under the mining contracts were admitted and adjudicated and disposed of under the PDA arbitration clause.

E [86] HLL was a non-signatory to the PDA. TLP and SEAP were also not parties or signatories to the PDA arbitration cl (article 14). However their claims had been admitted by the Arbitral Tribunal under the 'intended beneficiary concept' or third party beneficiary concept recognised under US law. Relief by way of damages was given to these parties under the PDA arbitration. The jurisdictional error has been expressed by the plaintiff's learned counsel as follows:

G First, the 'intended beneficiary' concept or third party beneficiary concept recognised under US Law is circumscribed by the scope and intent of the arbitration clause. The Expert retained by the Government of Laos Mr Joseph Sahid has pointed to the error of the arbitrators by reference to a recent decision of the US Court of Appeals in *Republic of Iraq v BNP Paribas* 472 Fed Appx 11 decided on March 28, 2012, where reliance was placed on the scope of the arbitration clause to decide if third party claims can be admitted.

H In that case, Iraq sought to invoke or rely on the arbitration clause in a contract between BNP Paribas and the United Nations. The US Appeals Court rejected Iraq's claim by construing the arbitration agreement and intent of the parties. It said:

I Assuming arguendo that Iraq is a third-party beneficiary with a right to enforce the United Nations contract with BNP Paribas, *Iraq must nevertheless show by a preponderance of the evidence that the parties intended to provide Iraq with the right to invoke arbitration.* See *Williams v Progressive Ne Ins Co*, 41 AD 3d 1244, 1245, 839 NYS 2d 381, 381 (4th Dep't 2007) ('It is well settled that a third party beneficiary is entitled only to those rights which the original parties to the

contract intended the third party to have.’); see also *Stolt-Nielsen SA v AnimalFeeds Int’l Corp*, 130 S Ct at 1782 (arbitration is a matter of consent, not coercion).

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For reason already discussed, the plain language of the provision defeat as any such contention. The provision’s focus on ‘Parties’, JA 339, and its express identification of parties as the only persons who could refer disputes to arbitration is all the more striking given that the agreement anticipated potential third-party claims in provisions that [**8] indemnify BNP Paribas for ‘any claim by a third party ... arising out of any breach of or failure to perform’ the agreement, JA 322. Thus, even if the contract between the United Nations and BNP Paribas can give rise to third-party claims, there is no evidentiary basis for concluding that the parties bound themselves to resolve such claims through arbitration.

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[87] Mr Das submitted that by applying the ratio in that case to the facts of our case, it is patently obvious that article 14.1 being the arbitration clause in the PDA was a party-based arbitration clause. The arbitration clause spoke of ‘each party’ or ‘both parties’ or ‘either party’ leaving no room for doubt that it was a signatory-based arbitration clause.

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[88] Learned counsel for the claimants/defendants, Mr Cecil Abraham, submitted that this concept of an ‘intended beneficiary’ was an exception to the privity rule. The arbitrators found in favour of the defendants on the issue of an ‘intended beneficiary’. At para 65 of the award it is recorded that:

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65. The tribunal agrees with the claimants that they have standing to bring these claims. TLL is a party to and *HLL is an intended beneficiary of the PDA* ... (Emphasis added.)

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[89] I find merits in the plaintiff’s submission that the American doctrine of a third party beneficiary is not articulated in the PDA. Instead the PDA had declared the integrity and intactness of the mining contracts which would include the preservation of the choice of law and dispute mechanism provisions of the mining contracts. There does not appear to be any cogent basis for the arbitrators to reasonably conclude that the intent ingredient (see *Republic of Iraq v BNP Paribas USA* 2nd Cir 2012) in the American doctrine of an intended beneficiary was met in this case. What is apparent from the award was that there was never any adjudication by the arbitrators or anyone whether Laos was in breach of the mining contracts. Yet Laos is directed to pay lost investment costs to TLL and HLL under the mining contracts! In any event there is no clause for recovery of lost investments under the mining contracts.

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[90] Learned counsel for the defendants, Mr Cecil Abraham, contended that the question at hand is whether or not HLL and the other non-signatories not

A being a named party in the PDA (and hence the arbitration agreement) can nevertheless be recognised as a party under the 'intended beneficiary' rule. That it was submitted was basically a question of law which the Arbitral Tribunal was free to decide one way or the other and not a jurisdictional question. Mr Abraham further contended that when the Arbitral Tribunal was confronted with two expert opinions that are diametrically opposite in that Mr Sahid said that the 'intended beneficiary' rule does not apply in the circumstances of the case and that Mr David Lindsey, the claimants' expert, said it does; it is perfectly permissible for the tribunal to decide which to follow and it is not for this court, exercising only supervisory and not appellate jurisdiction, to interfere. He further asserted that the credibility of the expert would be relevant. See *Hotel Continental Sdn Bhd v Cheong Fatt Tze Mansion Sdn Bhd* [2002] 3 MLJ 529 at pp 535–536; *Abdul Ghafur bin Mohd Ibrahim v Pengarah, Hospital Kepala Batas & Anor* [2010] 6 MLJ 181 at p 216 and *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 at p 421.

[91] Mr Abraham cautioned that we must be circumspect when considering the expert opinion of Mr Sahid because his credibility has been called in question by the Supreme Court, Appellate Division, First Department of New York where the court had recently imposed significant monetary sanctions against Mr Sahid finding that he had engaged in 'frivolous, outrageous and unprofessional behaviour' in connection with a New York court proceeding.

[92] I do not deny that the messenger is as important as the message. However, where the message is cogent and comprehensive where competency of the messenger is concerned one must not be constrained to reject it merely because character wise there is a blemish in the messenger. I appreciate that character and competence should ideally combine to produce that which is credible and cogent. Having said that I might hasten to add that merely because there is a dent on one's character, that does not mean that one's credibility has to be condemned outright. It remains a riddle of life that good people do lie and that bad people are no less capable of telling the truth! The point is whatever the source of the message, it must be able to stand the test of curial scrutiny.

[93] I am of the view that if a question is inherently a question of jurisdiction and perhaps incidentally a question of law and of interpretation of contract, then an error made there would affect the very jurisdiction of the Arbitral Tribunal. It must be primarily a question of jurisdiction and substantially one that goes to the very root of the jurisdiction of the Arbitral Tribunal and not just peripherally or secondarily related to jurisdiction. I do not consider the question raised above to be a question of law dressed up as a jurisdictional question designed to add ammunition to setting aside an award. When a question raised is inherently and innately one relating to the identification of

the parties to the arbitration agreement it is avowedly and acutely related to the scope of the jurisdiction of the Arbitral Tribunal appointed pursuant to article 14 of the PDA. It is a jurisdictional question and not just merely a question of law. A

Specific jurisdictional challenge — applying the wrong law of the arbitration agreement in admitting non-parties into the arbitration and awarding damages to non-parties B

[94] The position of non-parties to the arbitration agreement participating in the arbitration and prosecuting its claims to conclusion with an award in its favour can be considered from the perspective of the law governing the agreement to arbitrate and the law of the place where the reference is conducted, the *lex fori* of the seat of arbitration. Learned counsel for the plaintiff, Mr Das, referred to the fact that in an international arbitration it is not unusual for three different systems of law to be relevant: C D

- (a) the law governing the substantive contract;
- (b) the law governing the agreement to arbitrate; and
- (c) the law of the place where the reference is conducted as in the *lex fori* of the seat of arbitration. E

[95] Support for such a proposition can be found in the dicta of Mustill J in *Black Clawson v Papierwerke* [1981] 2 Lloyd's Rep 446 at p 453; Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at pp 357–358. F

[96] Mr Das for the plaintiff explained that the identification of the parties to an arbitration agreement is a matter covered by the law of the arbitration agreement as can be seen in *Peterson Farms Inc v C&M Farming Ltd* [2004] 1 Lloyd's Rep 603. Hence it is necessary for the arbitrators to determine which law governs the arbitration agreement. As was highlighted by Mr Das, the doctrine of 'intended beneficiary' being an exception to the privity rule is not recognised in all jurisdictions. G H

[97] It is common ground that the seat of arbitration is Malaysia as specified in the arbitration agreement contained in article 4.1 of the PDA and thus the AA 2005 is applicable. This imports with it the laws of Malaysia. As pointed out by Mr Das, article 14.1 is silent on the law governing the arbitration agreement. We know clearly the law governing the contract in the PDA to be a mixture of Laotian law and New York law under article 18.1. The arbitrators appeared to have proceeded on the assumption without deciding that New York law applies when they found the doctrine of 'intended beneficiary' to I

- A apply to admit HLL as a party to the arbitration. As further support for this the arbitrators appeared to be applying the 'group of companies' doctrine when it awarded damages for investments costs incurred by all the Siva Group of companies namely TLL, HLL, TLP and SEAP. This is borne out from the Grant Thornton reports from which the damages awarded were arrived at
- B where the defendants' claims consisted of the amalgamation of the expenses incurred by all the Siva Group of companies.

- C [98] I agree with Mr Das for the plaintiff Laos that since the parties had stipulated Malaysia to be the seat of arbitration, the parties had chosen the law of Malaysia as the law of the arbitration agreement and hence the proper law to determine the question of whether or not HLL and the other non-signatories could be recognised as a party to the arbitration agreement.

- D [99] Support for the above proposition can be found in *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500 where Toulson J in dealing with an insurance contract which contained an arbitration cl 65 where the designated seat was London and the governing law of the contract being the internal laws of the State of New York held as follows:

- E (b) by stipulating for arbitration in London under the provisions of the arbitration Act 1996 the parties chose English law to govern the matters which fell within those provisions including the formal validity of the arbitration clause and the jurisdiction of the arbitration tribunal; and by implication chose English law as the proper law of the arbitration clause.
- F (Emphasis added.)

[100] The decision of Toulson J in *XL Insurance Ltd v Owens Corning* was adopted by Cooke J in *C v D* [2007] 2 Lloyd's Rep 367 at [43] and [48].

- G [101] There is merits in the plaintiff's submission that if the arbitrators had applied the wrong regime of law they would have gone wrong in jurisdiction with respect to the proper parties to the arbitration. Their decision cannot then be said to be in accordance with the laws as agreed upon by the parties as envisaged in s 30(2) of the AA 2005. It was further submitted that had the arbitrators applied their mind to the laws of Malaysia in determining the question in hand, the arbitrators would have come to the conclusion that HLL could not be treated as a party to the arbitration, it is pertinent that the word 'party' and 'parties' are referred to throughout the AA 2005 to reflect the party or parties which are vested with the rights or imposed with the obligations under the AA 2005. Section 2 defines 'party' as follows:
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'party' means a party to an arbitration agreement or, in any case where an arbitration does not involve all the parties to the arbitration agreement, means a party to the arbitration.

[102] I agree with Mr Das that there is no reference in the AA 2005 to any 'intended beneficiary' who is not a party to the arbitration agreement who can participate in the arbitration proceedings. The AA 2005 also does not permit anyone, other than a party to the arbitration agreement, to participate in the arbitration proceedings.

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[103] The doctrine of 'intended beneficiary' is not a recognised exception to the privity rule under the laws of Malaysia. I agree with the plaintiff's submission that there is no difference when it comes to dealing with an arbitration agreement and who are entitled to pursue their rights via arbitration. *A fortiori*, in an arbitration as no one can be compelled to arbitrate their disputes, as opposed to litigation in the national courts, with a non-party to an arbitration agreement.

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[104] The Singapore High Court when confronted with the application of the 'intended beneficiary' doctrine had no problem dismissing it as an exception to the privity rule to allow non-parties to an arbitration agreement or third party beneficiaries to participate in an arbitration conducted pursuant to an arbitration to which they were not parties. In *Jiang Haiying v Tan Lim Hui & Anor* [2009] 3 SLR(R) 13, Andrew Ang J at para [45] said:

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45. Such a third party beneficiary exception to the privity rule has not yet been recognised in Singapore (outside of the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) which did not apply in the present case). Interestingly, Halsbury's ([23] supra) seems to have accepted such a proposition at para 20.020. However, the Malaysian case, *Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545, which was cited as authority does not, in my view, stand for the proposition that Halsbury's attributes to it.

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[105] Learned counsel also submitted that the requirement that the parties to an arbitration must be parties to the arbitration agreement from which the arbitration is to be initiated is also the position in England. See Mance J in *Grupo Torras SA and Torras Hostench London Ltd v Sheike Fahad Mohammad Al-Sabah & Ors* [1995] 1 Lloyd's Rep 374 at p 451; the English Court of Appeal's decision in *City of London v Sancheti* [2009] 1 LLR 117.

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[106] Learned counsel Mr Das argued that even under New York law one must fall under the accepted exceptions as enunciated in the US Court of Appeal (Second Circuit) decision in *Thomson CSF v American Arbitration Association* (1995) 64 F 3d 773 as follows at pp 776–780:

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I. Traditional Bases For Binding Nonsignatories

This court has recognised a number of theories under which nonsignatories may be bound to the arbitration agreements of others. Those theories arise out of common law principles of contract and agency law. Accordingly, we have recognised five

A theories for binding nonsignatories to arbitration agreements: 1) *incorporation by reference*; 2) *assumption*; 3) *agency*; 4) *veil-piercing/alter ego*; and 5) *estoppel*. The district court properly rejected each of these traditional theories as sufficient justification for binding Thomson to the arbitration agreement of its subsidiary.

A. Incorporation by Reference

B [4] A nonsignatory may compel arbitration against a party to an arbitration agreement when that party has entered into a separate contractual relationship with the nonsignatory which incorporates the existing arbitration clause. See *Import Export Steel Corp v Mississippi Valley Barge Line Co*, 351 F2d 503, 505–506 (2d Cir 1965) (separate agreement with nonsignatory expressly 'assum[ing] all the obligations and privileges of [signatory party] under the ... subcharter' constitutes grounds for enforcement of arbitration clause by nonsignatory); *Matter of arbitration Between Keystone Shipping Co and Texport Oil Co*, 782 FSupp 28, 31 (SDNY 1992); *Continental UK Ltd v Anagel Confidence Compania Naviera, SA*, 658 FSupp 809, 813 (SDNY1987) ('if a party's arbitration clause is expressly incorporated into a bill of lading, nonsignatories ... who are linked to that bill through general principles of contract law or agency law may be bound'). As the district court noted, E&S has not attempted to show that the working agreement was incorporated into any document which Thomson adopted. Thus, Thomson cannot be bound under an incorporation theory.

E B. Assumption

F [5] [6] In the absence of a signature, a party may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate. See *Gvozdenovic v United Air Lines, Inc*, 933 F2d 1100, 1105 (2d Cir) (flight attendants manifested a clear intention to arbitrate by sending a representative to act on their behalf in arbitration process), cert. denied, 502 US 910, 112 SCt 305, 116 LEd2d 248 (1991); *Keystone Shipping*, 782 FSupp at 31; *In re Transrol Navegacao SA*, 782 FSupp 848, 851 (SDNY1991). While Thomson was aware that the working agreement purported to bind it as an 'affiliate' of Rediffusion, at no time did Thomson manifest an intention to be bound by that agreement. In fact, Thomson explicitly disavowed any obligations arising out of the working agreement and filed this action seeking a declaration of non-liability under the agreement. Accordingly, it cannot be said that Thomson assumed the obligation to arbitrate.

G C. Agency

H [7] Traditional principles of agency law may bind a nonsignatory to an arbitration agreement. See *Interbras Cayman Co v Orient Victory Shipping Co*, SA, 663 F2d 4, 6–7 (2d Cir 1981); *A/S Custodia*, 503 F2d at 320; *Fisser*, 282 F2d at 233–38; *Keystone Shipping*, 782 FSupp at 31–32. Because the working agreement was entered into well before Thomson purchased Rediffusion, Thomson could not possibly be bound under an agency theory.

I D. Veil Piercing/Alter Ego

[8] [9] [10] In some instances, the corporate relationship between a parent and its subsidiary are sufficiently close as to justify piercing the corporate veil and holding one corporation legally accountable for the actions of the other. As a general matter, however, a corporate relationship alone is not sufficient to bind a nonsignatory to an

arbitration agreement. See *Keystone Shipping*, 782 FSupp at 30–31. Nonetheless, the courts will pierce the corporate veil ‘in two broad situations: to prevent fraud or other wrong, or where a parent dominates and controls a subsidiary.’ *Carte Blanche (Singapore) Pte, Ltd v Diners Club Int’l, Inc.*, 2 F3d 24, 26 (2d Cir 1993); see also *Wm Passalacqua Builders, Inc v Resnick Developers S, Inc.*, 933 F2d 131, 138–39 (2d Cir 1991) (‘Liability ... may be predicated either upon a showing of fraud or upon complete control by the dominating corporation that leads to a wrong against third parties.’). While the district court below noted that, ‘[c]ounsel for E&S also denied at oral-argument that its claim was properly articulated as veil-piercing,’ E&S now asserts that an alter ego relationship between Thomson and Rediffusion may exist. While E&S concedes that it can make no showing of fraud, it argues that Thomson sufficiently dominated Rediffusion as to justify veil piercing.

[11] Veil piercing determinations are fact specific and ‘differ[] with the circumstances of each case.’ *American Protein Corp v AB Volvo*, 844 F2d 56, 60 (2d Cir), cert, denied, 488 US 852, 109 SCt 136, 102 LEd2d 109 (1988). This court has determined that a parent corporation and its subsidiary lose their distinct corporate identities when their conduct demonstrates a virtual abandonment of separateness. See *Carte Blanche*, 2 F3d at 29 (‘No bank accounts, offices, stationery, transactions, or any other activities were maintained or carried on in the name of [the subsidiary].’); *Wm Passalacqua*, 933 F2d at 139 (corporate veil is pierced where, among other things, parent and subsidiary 1) share common office and staff; 2) are run by common officers; 3) intermingle funds; 4) do not deal at arms length with each other; and 5) are not treated as separate profit centers); see also *Walter E Heller & Co v Video Innovations, Inc.*, 730 F2d 50, 53 (2d Cir 1984) (absence of corporate formalities relevant factor in piercing corporate veil). ‘[T]he factors that determine the question of control and domination are less subjective than ‘good faith’; they relate to how the corporation was actually operated.’ *Carte Blanche*, 2 F3d at 28–29.

E&S has not demonstrated that Thomson exerted the degree of control over Rediffusion necessary to justify piercing the corporate veil. While the district court found that ‘Thomson has common ownership with [Rediffusion]; that Thomson actually controls [Rediffusion]; ... [and] that Thomson incorporated [Rediffusion] into its own organisational and decision-making structure,’ the district court did not find an abandonment of the corporate structure. E&S has not shown an absence of corporate formalities, nor has it shown an intermingling of corporate finances and directorship. Rather, as the district court found, Rediffusion continued to function as a distinct entity closely incorporated into the existing corporate structure of its parent company, Thomson. Accordingly, in light of the totality of the circumstances, Thomson cannot be bound by Rediffusion’s arbitration agreement under a veil piercing/alter ego theory.

E. Estoppel

[12] This court has also bound nonsignatories to arbitration agreements under an estoppel theory. In *Deloitte Noraudit A/S v Deloitte Haskins & Sells, US*, 9 F3d 1060, 1064 (2d Cir 1993), a foreign accounting firm received a settlement agreement concerning the use of the trade name ‘Deloitte’ in association with accounting practices. Under the agreement-containing an arbitration clause-local affiliates of the international accounting association Deloitte Haskins & Sells International were entitled to use the trade name ‘Deloitte’ in exchange for compliance with the

- A dictates of the agreement. A Norwegian accounting firm received the agreement, made no objection to the terms of the agreement, and proceeded to utilise the trade name. This court held that by knowingly exploiting the agreement, the accounting firm was estopped from avoiding arbitration despite having never signed the agreement. See 9 F3d at 1064 ('Noraudit failed to object to the agreement when it received it ... In addition, Noraudit knowingly accepted the benefits of the agreement ... Thus, Noraudit is estopped from denying its obligation to arbitrate under the 1990 agreement.').
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Although the district court did not analyse the case at hand under an estoppel theory, the court specifically found that:

- C Thomson had notice of the Working Agreement prior to ... completing the purchase of Rediffusion, that E&S expressed the intention to bind Thomson to the agreement prior to the completion of the purchase of Rediffusion, that Thomson incorporated [Rediffusion] into its own organizational and decision-making structure, and that Thomson benefitted from that incorporation.
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(citations omitted). On their face, these factual findings appear sufficient to bind Thomson to the arbitration clause of its subsidiary under Deloitte. Upon closer inspection, however, the district court's determination that Thomson derived direct benefit from the working agreement is erroneous.

- E As Thomson points out, the working agreement provided that Rediffusion would purchase computer-generated image equipment exclusively from E&S and, in return, E&S would supply its imaging equipment only to Rediffusion. E&S concedes that *779 Thomson has never acquired, nor sought to acquire, imaging equipment from E&S. Rather, E&S asserts a theory of benefit under the working agreement which in essence amounts to an anti-trust violation-according to E&S, Thomson purchased Rediffusion (its only serious competitor in the flight simulation industry) so that it could keep Rediffusion from competing; by incorporating Rediffusion into its own structure, Thomson was able to eliminate all simulators utilising E&S imaging equipment from the market; because E&S was contractually bound to supply only Rediffusion with imaging equipment, it was effectively shut out of the market; thus, E&S contends that Thomson benefitted from the working agreement by eliminating E&S as a competitor.
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This indirect benefit which E&S asserts-and the district court implicitly adopts-is not the sort of benefit which this court envisioned as the basis for estopping a nonsignatory from avoiding arbitration. Had Thomson directly benefitted from the working agreement by seeking to purchase equipment from E&S or enforcing the exclusivity provisions of the agreement, it would be estopped from avoiding arbitration. The benefit which E&S asserts, however, derives directly from Thomson's purchase of Rediffusion, and not from the working agreement itself; Thomson received no benefit at all from the working agreement (as opposed to the acquisition). Thus, Thomson is not bound by its subsidiary's arbitration agreement under Deloitte.

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Several courts of appeal have recognised an alternative estoppel theory requiring arbitration between a signatory and nonsignatory. See *Sunkist Soft Drinks, Inc v Sunkist Growers, Inc*, 10 F3d 753, 757-58 (11th Cir 1993), cert, denied, 513 US

869, 115 SCt 190, 130 LEd2d 123 (1994); *JJ Ryan & Sons, Inc v Rhone Poulenc Textile, SA*, 863 F2d 315, 320–21 (4th Cir 1988); *McBro Planning & Dev Co v Triangle Elec Constr Co*, 741 F2d 342, 344 (7th Cir 1984). In these cases, a signatory was bound to arbitrate with a nonsignatory at the nonsignatory's insistence because of 'the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract ... and [the fact that] the claims were 'intimately founded in and intertwined with the underlying contract obligations.'" *Sunkist*, 10 F3d at 757 (quoting *McBro Planning*, 741 F2d at 344). It is clear that an arbitration clause bound Thomson's subsidiary, Rediffusion. The district court also found that the management of Rediffusion and Thomson were closely related. Moreover, E&S argues that the claims against Thomson are 'intimately founded in and intertwined with' the working agreement. Nonetheless, Thomson can not be bound to arbitrate under this line of cases.

As these cases indicate, the circuits have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed. As the district court pointed out, however, '[t]he situation here is inverse: E&S, as signatory, seeks to compel Thomson, a non-signatory.' While E&S suggests that this is a non-distinction, the nature of arbitration makes it important. arbitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so. See *United Steelworkers*, 363 US at 582, 80 SCt at 1352–53. In the line of cases discussed above, the courts held that the parties were estopped from avoiding arbitration because they had entered into written arbitration agreements, albeit with the affiliates of those parties asserting the arbitration and not the parties themselves. Thomson, however, cannot be estopped from denying the existence of an arbitration clause to which it is a signatory because no such clause exists. At no point did Thomson indicate a willingness to arbitrate with E&S. Therefore, the district court properly determined these estoppel cases to be inapposite and insufficient justification for binding Thomson to an agreement that it never signed.

Moreover, these estoppel cases all involve claims which are integrally related to the contract containing the arbitration clause. The same cannot be said of the case at hand. As discussed above, E&S's claims against Thomson amount to the assertion that Thomson purchased Rediffusion in order to eliminate it as a competitor. While a cause of action may lie against Thomson for such alleged predatory business practices, the violation can hardly be characterised as arising out of or being integrally related to the working agreement between E&S and Rediffusion. Thus, the analogy to this line of estoppel cases again must fail. (Emphasis added.)

[107] Applying those tests the Court of Appeals (Second Circuit) held at p 780:

The district court below improperly extended the limited theories upon which this court is willing to enforce an arbitration agreement against a nonsignatory. The district court's hybrid approach dilutes the safeguards afforded to a nonsignatory by the 'ordinary principles of contract and agency' and fails to adequately protect parent companies, the subsidiaries of which have entered into arbitration

A agreements. Anything short of requiring a full showing of some accepted theory under agency or contract law imperils a vast number of parent corporations. This court did not intend such an outcome in Deloitte or McAllister and does not adopt such an approach here.

B [108] Unless it can be shown that HLL has come within the accepted exceptions, HLL being a non-signatory to the arbitration agreement cannot become a party to the arbitration proceedings and neither can non-parties claims by TLP and SEAP be lumped together in the arbitration award. It would be apposite to affirm once again the basic principles distilled by the US Court of Appeals (Second Circuit) in *Thomson CSF's* case at p 776:

D arbitration is contractual by nature — 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit'. *United Steelworkers of America v Warrior & Gulf Navigation Co*, 363 US 574, 582, 80 SCt 1347, 1353, 4 LEd2d 1409 (1960). Thus, while there is a strong and 'liberal federal policy favoring arbitration agreements,' *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614, 625, 105 SCt 3346, 3353, 87 LEd2d 444 (1985) (quotations omitted), such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract.

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Specific jurisdictional challenge — aggregating claims under the mining contracts and with respect to non-parties in an arbitration under the PDA

F [109] The plaintiff's learned counsel Mr Das underlined the fact that apart from the envisaged formation of the joint venture vehicle HLL, the mining contracts do not mention the involvement or participation of any other party and certainly no mention of TLP or SEAP.

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H [110] I find that the Arbitral Tribunal had proceeded to adjudicate matters under the mining agreements and in particular claims for the recovery of investment costs on roads and survey which are clearly matters under the mining contracts and completed under the mining contracts to be decided under Loatian law in the event the defendants here (the claimants there) are desirous of challenging the validity of the termination of the mining agreements. Under the mining contracts a road of 70km was built by TLL and HLL from Hongsa mine site to and into Thailand as the original plan was to sell lignite in Thailand to Thai power companies. In fact Mr Siva in his witness statement admitted that investment costs in terms of infra-structure and road building were completed by mid 1994 before the entry into the PDA.

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[111] The choice of law clause, in this case, Laotian law, is a matter of contract and the tribunal cannot alter that for the parties especially Laos.

Clause 2 of the mining contracts expressly declared that ‘both parties shall be subject to this agreement under the rules, procedures, and the Law of the People’s Democratic Republic of Laos’.

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[112] The result of the Arbitral Tribunal exercising jurisdiction over the defendants claims under the mining contracts which is governed by Laos law was that it had allowed TLL to aggregate all funds it said it spent on the project including under the mining contracts and awarded them as ‘investment costs’. That sum was USD40m and the Arbitral Tribunal then said the ‘premium’ would be 10% and they added another USD4m to the award. The PDA governing law subject to certain matters falling under Laotian law, is New York law and the arbitrators applied New York’s law 9% prejudgment interest rule resulting in another USD12m being added to the award. As I understand Mr Das’ submission, an arbitration under the mining contracts being solely under Laotian law, TLL/HLL would not be able to claim a prior arbitral approval for the termination under the mining contracts unlike a termination under the PDA. Laos was in the process denied a defence of termination under Lao law for poor performance. It was further submitted that arbitration under the mining contracts would allow for a measure of damages other than a return of the investment but it would not allow an award of 10% premium. It was a case of jurisdictional error at the outset jettisoning and jeopardising the overall award as the outcome.

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[113] The aggregation of claims under both contracts and by so-called investments in the ‘project’ by non-parties like TLP and SEAP was admitted under the ‘group of companies’ approach taken by the arbitrators.

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[114] Apart from the jurisdictional objection, this doctrine has been criticised in *Peterson Farms Inc v C&M Farming Ltd* [2004] 1 Lloyd’s Rep 603 with the English Court holding that the arbitrators had failed to ascertain if the doctrine was recognised by Arkansas Law, the proper law of the contract. The tribunal there similarly awarded damages which consisted of losses suffered by the other C&M group entities and Peterson challenged that part of the award on the basis that the tribunal had no jurisdiction to entertain the claims by entities which were not named as parties to the agreement (see para 7 at p 605). At p 610, Langley J reproduced para 93 of the award as follows:

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93 The tribunal does not consider that it is legally precluded from considering C&M’s damages claims to cover and embrace the damages of all C&M Group companies. The group of companies doctrine provides that an arbitration agreement signed by one company in a group of companies entitles (or obligates) affiliate non-signatory companies, if the circumstances surrounding negotiation, execution, and termination of the agreement show that the mutual intention of all the parties was to bind the non-signatories. Following the Dow Chemical decision and ICC case numbers 2375 and 5103, the tribunal recognised that because a group

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- A of companies constitute the same 'economic reality' one company in the group can bind the other members to an agreement if such a result conforms to the mutual intentions of all the parties and reflects the good usage of international commerce. This tribunal considers that such circumstances are present in this case.
- B ...
- C 100 In summary, the record of correspondence between the parties and internal documents of Peterson, the preliminary documents exchanged between the parties, and the general nature of the poultry business demonstrate that Peterson intended to enter into and perform under a contract with all the entities forming the C&M Group of companies. Peterson knew that it was contracting with the group as a whole and that its product would be used in an integrated operation that involved all members of the C&M Group. The tribunal considers that C&M is fully entitled to claim all damages suffered by the C&M Group and arising out of the contractual relationship with Peterson.
- D [115] In upholding Peterson's challenge, Langley J said at paras 47 and 62:
- E 47. There was, therefore, no basis for the tribunal to apply any other law whether supposedly derived from 'the common intent of the parties' or not. The common intent was indeed expressed in the agreement: that is both English and Arkansas law (para 17 of Mr Hollingsworth's statement). The 'law' the tribunal derived from its approach was not the proper law of the agreement nor even the law of the chosen place of the arbitration but, in effect, the group of companies doctrine itself.
- F ...
- F 62. In the context of the group of companies doctrine the agreement was that Arkansas law was the same as English law. As I have already said, English law treats the issue as one subject to the chosen proper law of the agreement and that *excludes the doctrine which forms no part of English law*. (Emphasis added.)
- G [116] In the result Langley J held at para 71 as follows:
- H 71. *Peterson is entitled to have that part of the award which awarded payment of losses by other C&M group entities set aside for want of jurisdiction*. It is also entitled to have the award of costs (and expenses) remitted to the tribunal for further consideration in the context of this judgment. I will hear the parties on the form of order to be made and any other matters they wish to raise when this judgment is handed down. (Emphasis added.)
- I [117] The governing law of the PDA is a mixture, within their respective spheres, of Laos law and New York law: see article 18. By article 15.1(b) a measure of damages by way of compensation is provided for. Learned counsel Mr Das argued forcefully that it would be fanciful to assume that Laos had agreed that it would compensate non-parties to the PDA directly or indirectly. He further theorised that the alleged investment costs of the four companies ie

TLL, HLL, TLP and SEAP were received on the basis that the mining contracts and the PDA were one project. Truth be told, this assumption belies the terms of the PDA itself as regards separateness of the two contracts.

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[118] Learned counsel also argued that this approach is also problematical because non-signatories were recognised to have invested in the project but the PDA was never amended to give these non-parties any recognition or contractual status. For example, SEAP, a Siva company, allegedly invested in TLP, but that investment cannot be recognised under a PDA arbitration because that investment was not an investment under the PDA duly recognised as such by Laos, the other contracting party to the PDA. If true, it was by all counts a private arrangement within the Siva group of companies of funding, but it was wholly wrong to charge it as a PDA recognised investment.

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[119] To illustrate his point, Mr Das referred to excerpts from Ernst & Young in its report dated 20 February 2009 where it commented as follows in reviewing the claim by TLL and HLL for financing costs:

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49. The only logical conclusion to be reached from the above observations, is that:

Significant portions of the alleged loans were most likely raised for purposes other than for the Project.

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The total interest claimed is significantly excessive given the represented uses of funds.

All expenses claimed in relation to the restructuring of the loans, including exchange losses and all default interest, are most likely not Project related.

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[120] Further in the supplemental report by Ernst & Young dated 15 June 2009, which was a review of the Grant Thornton's Response to Ernst & Yong's Report dated 20 February 2009, the following were observed:

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9. ... We have reviewed this information and reconciled with the inventory of information that we view in the claimants' data room during the period from 21 January 2009 to 19 February 2009. Accordingly, we noted the following:

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GT's Response Report had provided new information that was not available in the data room.

GT's Response Report also confirms that they too have not sighted or have not submitted all of the information that one would expect to sight in support of the claimed costs.

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The GT's Response Report and accompanying appendices confirm that a significant amount of information provided in GT's Response is not supported by third party documentation. GT relies on significant amounts of information supported only be internally generated documents or alleged management explanations.

A Expenses incurred by various entities, including entities not party to this arbitration

23. In this regard we wish to state the following:

B We reiterate that we are instructed that only TLL and HLL are parties to the arbitration. The validity of inclusion or exclusion of the other entities, regardless of the circumstances that prevailed, is therefore a matter to be determined at the arbitration based on the legal merits of the issues at hand.

C To rationalize the manner as to how such costs were contracted, incurred, paid and recorded based on 'common practice', and therefore to argue that it is acceptable, does not address the issues at hand. The practices adopted by the entities to transact, finance and record, which GT characterizes as 'common practice' are, in our view, in fact bad practice that can lead to breach of contractual undertakings, particularly where financing of such costs are said to be based on externally borrowed funds and appear to be pooled. In our experience, whenever such practices have been adopted, it has the potential to lead to preferential related party transactions and breach of financial and fiduciary obligations.

E [121] Ernst & Young had further commented as follows with respect of the claim for financing costs by TLL and HLL and the analysis by Grant Thornton:

... These observations confirm the point that the claimants and their related entities resorted to borrowings that they had no intention to sue for the purposes of the Project.

F In the final analysis, we reiterate our view that the claimants and their related entities had resorted to excessive borrowings, the purpose of which is yet to be supported. GT also acknowledge this when they state, 'Of the total funds raised by TLL and SEAP, Bt 1 billion was lent to other parties ...'

G 60. All of this analysis further confirms that not all of the money raised was indeed used for the project and that there were excessive amounts of funds borrowed, beyond the funds that were allegedly used in the Project.

H [122] Learned counsel for the plaintiff contended that the extracts from the two Ernst & Young reports quoted in extenso above demonstrate the injustice done to Laos by the aggregation of claims under the two contracts (ie the mining contracts and the PDA) and treating it as a single claim for calculating 'lost investment' costs due only under the PDA.

I [123] I agree with the plaintiff that jurisdictionally speaking, so-called 'lost investment' costs are not recoverable under the mining contracts. Their inclusion by the aggregation method as a PDA claim by the arbitrators was a fundamental jurisdictional error.

[124] As succinctly summarised by Mr Das for the plaintiff, the jurisdictional complaint is both a party and contracts complaint in that the arbitrators failed to separate the investment costs by contracts or by party. In failing to do so the award ended up dealing with a dispute not contemplated by or not falling within the terms of the submission to arbitration as envisaged by s 37(1)(a)(iv). By the same reason the award contains decisions on matters beyond the scope of the submission to arbitration as envisaged by s 37(1)(a)(v).

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PRONOUNCEMENT

[125] I am conscious of the fact that an award of an Arbitral Tribunal is generally final and binding and can only be set aside on the limited grounds provided for in s 37 of the AA 2005 for this purpose. I also remind myself that my powers are supervisory and not appellate in nature.

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[126] Having read the award, I cannot excise the part or portion which is attributable to claims under the mining contracts governed as it is under Laotian Law, and the part or portion under the PDA, governed as it is partly under Laotian law and partly under New York law. It has been so co-mingled and computed together such that it is impossible to excise and extract that which should strictly stem from the PDA as opposed to that which has its source traceable to the mining contracts.

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[127] As the effective challenge is one of excess of jurisdiction, the whole award in the circumstance of the case, has to be set aside and I hereby so order. The dispute confining to the PDA and solely between the parties to the arbitration agreement is to be re-arbitrated before a new panel, resisting every temptation to traverse or transgress into the mining contracts which are governed by Laotian law. I also awarded costs of RM50,000 to the plaintiff.

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Application allowed with costs.

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Reported by Kanesh Sundrum

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